

United States Circuit Court of Appeals

For the Ninth Circuit

No. 6111

WILHELM WILHELMSSEN
LIBELANT AND APPELLEE

vs.

THE BARK "THIELBEK," Knohr & Burchard, Nfl.
CLAIMANTS AND APPELLEES

THE PORT OF PORTLAND
RESPONDENT AND APPELLANT

No. 6116

KNOHR & BURCHARD, Nfl.
LIBELANT AND APPELLEE

vs.

THE "THODE FAGELUND," Wilhelm Wilhelmsen
CLAIMANT AND APPELLANT

THE PORT OF PORTLAND
RESPONDENT AND APPELLANT

Brief for Appellant, The Port of Portland

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KNOHR & BURCHARD, Nfl.,
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THE "THODE FAGELUND,"
Wilhelm Wilhelmsen,
Claimant and Appellant,
THE PORT OF PORTLAND,
Respondent and Appellant.

Brief of Appellant, The Port of Portland

STATEMENT

This controversy arises out of a collision in Astoria Harbor on the morning of the 24th of August, 1913, between the steamship "Thode Fage-

lund," fully laden and going to sea, and the four-masted bark "Thielbek," in ballast, in tow of the "Ocklahama," a stern-wheel tow-boat, owned and operated by The Port of Portland.

The amount of damages as ascertained by the trial court is not in controversy, as all parties are satisfied with the awards made by the trial court.

The "Thode Fagelund" is a steamship 350 feet in length and was fully laden with cargo consisting mainly of lumber loaded at points on the Willamette and Columbia Rivers, and was under time charter to W. R. Grace & Company. It came down the river on the evening of the 23rd of August, 1913, in charge of a pilot, a member of the Columbia River Pilot Association and not in the employ of The Port of Portland, and it anchored in Astoria Harbor near Flash-Buoy No. 2, as shown on Claimant's Exhibit No. 2 (Apostles, page 1423), about 9:40 p. m. About this hour M. Nolan, a pilot regularly employed by The Port of Portland, in pursuance of an order of the superintendent of towage and pilotage of The Port, went on board for the purpose of piloting this steamship to the open sea, the master of the vessel having theretofore applied to The Port of Portland for a bar pilot. Nolan was a pilot of five years' experience on the waters where the collision occurred.

At this time there was anchored in the Astoria Harbor, at a point approximately a thousand feet below the point of anchorage of the "Thode Fagelund," the United States dredge "Chinook," about

450 feet in length. This point is approximately shown on Wilhelmsen, Nolan Exhibit 4 (Apostles, page 1417). This dredge was anchored on the north side of the harbor and was swinging with the tide, but being of lighter draught was not affected by the tide so quickly as the "Thode Fagelund." It stood high out of the water, so high that from where Pilot Nolan stood on the "Thode Fagelund" on the morning of the collision none of the lights of the "Ocklahama" could be seen over the "Chinook" for two-thirds of her length, and in like manner the running lights of the "Thode Fagelund" could not be seen from the "Ocklahama" or the "Thielbek."

On the evening of the 23rd of August, 1913, the master of the "Thielbek," a German bark about 300 feet in length, applied to The Port of Portland for a tow-boat to tow said vessel from its anchorage to the City of Portland for loading. At this time the "Thielbek" was anchored approximately three miles below the point where the "Thode Fagelund" was anchored. The approximate anchorage of the "Thielbek" is shown on Claimant's Exhibit 2, (Apostles, page 1423). About 10:40 p. m. of that day the "Ocklahama" reached the "Thielbek" and was lashed to the "Thielbek." This tow-boat was one of the most powerful tow-boats on the river, fully equipped and manned and employed regularly in towing vessels of this character up and down the Columbia and Willamette Rivers between the anchorage grounds where the "Thielbek" was anchored and the southernmost boundaries of The

Port of Portland. Her master was Isaac Turppa, by whom the tow-boat was taken to the "Thielbek" and under whose directions the "Thielbek" was lashed to the "Ocklahama"; but after this was accomplished he went to bed and knew nothing more of what happened until immediately prior to the collision. The pilot upon the "Ocklahama" was A. L. Pease, Jr., a duly licensed pilot regularly employed by The Port of Portland, who had been engaged upon the "Ocklahama" as pilot for approximately one year prior to the collision. Between the point of anchorage of the "Thode Fagelund" and the point of anchorage of the "Thielbek" the view was entirely unobstructed except in so far as the same was obstructed by the "Chinook" swinging on the flood and ebb tides as above described.

The Port of Portland is a municipal corporation created and organized under an Act of the Legislative Assembly of the State of Oregon in 1891. Its territorial boundaries were extended by an Act of 1901 and by the same act its powers were enlarged, but under neither of these acts did it have the power to engage in towage and pilotage. In 1908 an act was proposed by initiative petition and duly adopted by the legal voters whereby the powers of The Port of Portland were again enlarged. By this act it was "authorized and empowered to establish and maintain an efficient towage and pilotage service between the corporate limits of The Port of Portland and the open sea." This act contains a limitation clause as follows:

“If a vessel or cargo, while being towed by a vessel owned or operated by The Port of Portland, or while under the charge of a pilot employee of The Port of Portland, is injured or lost by reason of the fault of such tug, or the negligence or incompetence of such pilot, The Port of Portland shall not be liable for any loss or injury thereof in excess of \$10,000.”

The ship channel of the river from where the “Thode Fagelund” was anchored to the point where the “Thielbek” was anchored is more than a thousand feet in width at the narrowest place, and at the place of the collision is approximately fifteen hundred feet in width.

The “Thode Fagelund” had on deck beside the pilot Nolan, who was on top of the wheel-house, its master, M. B. Hansen, who was standing on the bridge about seven feet below the pilot, the steersman, Rasmussen, who was at the wheel and also on the bridge, and the mate or first officer, J. A. Hansen, who was on the top deck of the forecastle head and who was in charge of the anchors and also acting as lookout.

On the “Ocklahama” Pease, the pilot, was in charge and was in the pilot-house standing at the wheel about 33 feet above the water; W. R. Eckhart was the watchman and lookout and he was also in the pilot-house with Pease.

On the deck of the “Thielbek” was Gerdes, the lookout, who was forward on the forecastle head

(the testimony of this witness is so ambiguous, obscure and contradictory that it is not certain at what time he saw the "Thode Fagelund") ; William Eggars, first officer, who was in charge of the watch and was aft high up on the poop on the starboard side; and Oehring, third officer, who did not see the "Thode Fagelund" until after the passing signals were given and exchanged.

Nolan, the pilot, Hansen, the master, and Hansen, the first officer, of the "Thode Fagelund," saw the "Thielbek" and "Ocklahama" at practically the same instant and each of them was keeping a good outlook. The pilot, however, saw not only the rigging of the "Thielbek" but at the same time saw the towing lights or mast lights and the running lights of the "Ocklahama." There is some question whether the red light of the "Thielbek" was burning or not. The green light of the "Ocklahama" was not burning, but a green light was on the starboard side of the "Thielbek" and burning there. Hansen, the master, and Hansen, the mate, seemingly saw at first only the rigging of the "Thielbek," but they were standing seven feet below Nolan, the pilot. The running lights of the "Thielbek" and "Ocklahama" were in view of those on the "Thode Fagelund" until immediately prior to the collision, when the red lights were shut out and the "Ocklahama" was obscured by the "Thielbek," as she was a much shorter vessel and lashed to the aft quarter on the port side of the "Thielbek." From the "Ocklahama" the range lights on the "Thode Fagelund" were

seen above and over the "Chinook" and were open, and the green light was seen also over and beyond the "Chinook" for a moment and then was shut out of sight and was not seen again until about the time the second passing signal was given by the "Thode Fagelund." The green light of the "Thode Fagelund" remained in view until immediately before the collision and the red light during this time was shut out, but immediately before the collision the red light flashed in view of those on the "Ocklahoma." On the "Chinook" there was an anchor light forward and one aft, and about seven lights between these lights. These anchor lights seemingly were observed by first officer Eggars on the "Thielbek" well on the port side of the course of the "Thielbek." Afterward he saw the two masthead lights and the green light of the "Thode Fagelund," which showed just clear of the "Thielbek" on the starboard side and clear of the "Chinook." Immediately before the collision he saw the red light of the "Thode Fagelund."

Under the rules of The Port of Portland its masters and pilots were required to make reports of all accidents. The report of M. Nolan, the pilot on board the "Thode Fagelund," made on the day of the collision, is as follows (Apostles, pages 900 and 901) :

"Astoria, August 24th, 1913, at 3:20 a. m., S. S. 'Thode Fagelund' weighed anchor from off the O.-W. R. & N. Dock; started ahead under a slow bell; in about five minutes' time speed was in-

creased to half speed ahead. The dredge 'Chinook' was at anchor off, and at about the middle, of the O.-W. R. & N. Dock laying directly across the channel, leaving the channel obscured that one could not see an approaching vessel. When within about one ship's length from the 'Chinook,' which was swinging to flood tide and her stern towards the Astoria side of the channel, I saw a sailing vessel under tow almost ahead on, or about one-quarter of one point on our starboard bow; I blew two whistles to pass on the starboard and received no answer; stopped our engine and blew two whistles again and was answered by two whistles from the steamer 'Ocklahama,' which was towing the ship 'Thielbek.' I then backed full speed astern, and blew danger signal (four whistles), which was not answered. I then let go port anchor with fifteen fathom of chain, blew four whistles again, which were not answered. As the steamer 'Thode Fagelund's' headway was about stopped, anchor down with fifteen fathoms of chain on it, engine backing full speed astern it caused the steamer's head to swing to starboard about one-half of one point. The ship 'Thielbek' struck the steamer 'Thode Fagelund,' at 3:32 a. m., on the stern head, cutting her on the port bow below the water line. The 'Thode Fagelund's' headway was about stopped, engines backing full speed astern, port anchor down with fifteen fathom of chain when the ship 'Thielbek' struck her. The steamer 'Thode Fagelund' was under way only twelve minutes when struck, and had gone

only about one thousand feet and had very little more than steering way on her up to the time of the accident. The 'Thode Fagelund' remained in the same position all day, and on Monday at 10:30 a. m. was moved to an anchorage off Tongue Point."

The report of Pilot Pease, who had charge of the tow-boat and her tow, made on the same day, is as follows (Apostles, pages 1142 and 1143) :

"At about 3:20 on August twenty-fourth, as I was passing Callender Dock in Astoria Harbor with the bark 'Thielbek' in tow, I saw the green light and the two masthead lights of a steamer on my port bow. I could see the lights of this steamer, but could not see the steamer herself, on account of the dredge 'Chinook' being anchored on my port bow, and between the steamer and myself.

"As soon as I saw the steamer's lights, I slowed down, and she blew me two whistles, and I put my helm hard astarboard, but hesitated to answer her signal until she came out from behind the dredge. As she was coming out from behind the dredge she blew me two whistles again and as it looked to me as she could pass on my starboard side I answered her and shortly after stopped and backed full speed on a port helm. The steamer, instead of swinging to her port, or even holding her course, kept swinging to her starboard until I could see her red light.

"After I had been backing full speed for between three and four minutes, and had most of the headway off the bark, the steamer let go her anchor and

a few seconds later the bark and the steamer came together head on."

This officer also made a report to the local United States Inspectors in Portland. This was made on the same day and is as follows (Apostles, pages 1147 and 1148) :

"At about three-twenty on August twenty-fourth, as I was passing Callender Dock, in Astoria Harbor, with the bark 'Thielbek' in tow, I saw the green light and the two masthead lights of a steamer on my port bow. I could see the lights of this steamer, but could not see the steamer herself on account of the dredge 'Chinook' being anchored on my port bow, and between the steamer and myself. As soon as I saw the steamer's lights I slowed down, and she blew me two whistles, and I put my helm hard astarboard, but hesitated to answer her signal until she came out from behind the stern of the dredge. As she was coming out from behind the dredge, she blew me two whistles again, and as it looked to me that she could pass on my starboard side, I answered her, and shortly after stopped, and backed full speed on a port helm.

"The steamer, instead of swinging to her port, or even holding her course, kept swinging to her starboard until I could see her red light.

"After I had been backing full speed for between three and four minutes and had a great deal of the headway off the bark, the steamer dropped her anchor and a few seconds later the steamer and

the bark came together head-on, tearing a large hole in the steamer on her port side a few feet from the bow and driving the bark's anchor through a few plates and denting a number of others on both sides of her bow.

"This collision occurred at about three twenty-five in the morning abreast the O.-W. R. & N. Dock.

"I got the two vessels apart in about one hour and a half, and as the steamer said she needed no assistance I left her anchored there."

Seemingly a careful lookout was kept on both the "Thode Fagelund" and the "Ocklahama," and the "Thode Fagelund" was seen from the "Ocklahama" at practically the same instant at which the "Ocklahama" was seen from the "Thode Fagelund." At this time the vessels were about fifteen hundred feet distant from one another.

The "Thode Fagelund" left her anchorage and navigated under a slow bell for about five minutes. She then navigated under half speed bell for about five minutes; before the "Ocklahama" and "Thielbek" were seen she was navigating under a starboard helm, which was necessary in order to enable her to pass the stern of the "Chinook." Almost as soon as the "Ocklahama" and "Thielbek" were seen she was put under a hard astarboard helm and continued under this helm until the collision. Immediately after the "Ocklahama" and "Thielbek" were seen from the "Thode Fagelund" the "Thode Fagelund" gave two whistles as a passing signal. This

signal was not answered, and thereupon the "Thode Fagelund" at once stopped her engines. Within ten or twelve seconds after the first passing signal the "Thode Fagelund" repeated the passing signal by giving two whistles and this signal was promptly answered by the "Ocklahama" with two whistles. The "Ocklahama," before she saw the "Thode Fagelund," was proceeding up the river with her tow, full speed ahead, and making about six miles an hour, which was the customary speed for boats towing ships of this character under circumstances such as then prevailed. The night was clear but dark. As soon as the "Thode Fagelund" was seen the officers of the "Ocklahama" reduced her speed to half speed. At that time she was proceeding at a distance of from 150 to 350 feet from the Astoria dock line and under a slight port helm so as to keep at about the same distance from the Astoria shore. When the signals were exchanged the "Ocklahama" at once went under the hard astarboard helm. Meanwhile her speed had been reduced from half speed to stop and then for some time prior to the collision to full speed astern, but her headway had not been entirely eliminated, as the tide was flooding. The course of the "Thode Fagelund" at the time that she gave the passing signals and was proceeding under a starboard helm was such as to carry this steamship about one hundred feet aft of the "Chinook." At this time the steamship was about three hundred and fifty feet, one boat's length, from and above the stern of the

“Chinook.” After the second passing signal was given and answered the “Thode Fagelund” blew four whistles and then went full speed astern, but gave no signal indicating that her engines were reversed, and she continued to go full speed astern until the collision, keeping her helm hard astarboard. After giving the four whistles she let go her port anchor and then again blew four whistles. It appears from the testimony of those on board the “Thode Fagelund” that if the “Ocklahama” and her tow had kept their course at the time of the first signal and the “Thode Fagelund” had maintained her course there would have been a collision, and that such a collision could have been prevented only by the “Ocklahama” and her tow bearing to port on a starboard helm. From the testimony of the same witnesses this was true at the time the second passing signal was given and answered, and at either of these times, in the judgment of the pilot on the “Thode Fagelund” and of her master, a passing to port was impossible, as to accomplish this the “Thode Fagelund” would have collided with the “Chinook.”

The “Thode Fagelund” in backing throws her bow to starboard. The collision occurred between 50 and 200 feet from the “Chinook” and just abreast of the “Chinook,” the “Thode Fagelund” having passed the stern of the “Chinook.” At the time of the collision the navigable water between the stern of the “Chinook” and the Astoria docks was between 700 and 800 feet in width. The “Thielbek” struck

the "Thode Fagelund" on the port side about 25 feet from the bow.

No question is made of the capacity of the "Ocklahama" to tow the "Thielbek," and there is no claim that anyone was deceived or misled by the running lights of either vessel.

The first libel filed was filed on behalf of the owner of the "Thode Fagelund," a libel *in rem* against the "Thielbek" and *in personam* against The Port of Portland. In this libel it is charged that the "Ocklahama" and "Thielbek" were negligently and carelessly and imprudently navigated in certain particulars:

1. That the officer in charge of the "Ocklahama" was inexperienced.

2. That no lookout was kept upon the "Thielbek" or upon the "Ocklahama."

3. That the "Ocklahama" and "Thielbek" were navigated with a varying helm.

4. That the "Ocklahama" did not promptly answer the passing signals, or when she did answer did not observe and obey the same.

5. That the "Ocklahama" was operated at too high speed.

6. That the "Ocklahama" failed to act on or observe the known position of the dredge "Chinook" and the fact that the "Thode Fagelund" was departing on an outward-bound voyage on the turn of the tide.

7. That the officers of the "Ocklahama" and

“Thielbek” did not watch the compass bearing of the approach of the “Thode Fagelund.”

8. That when the pilot of the “Ocklahama” saw the red light of the “Thode Fagelund” he did not conduct his vessel as he should have done so as to pass safely between the “Thode Fagelund” and the railroad wharf in Astoria.

9. That the “Ocklahama” and the “Thielbek” did not give the “Thode Fagelund” sufficient clearway, either one side or the other of the available open channelway. (Article X, Apostles, pages 23 and 24.)

Each and all of these allegations of the libel were determined adversely to the “Thode Fagelund” by the trial court. The trial court entirely exculpated the “Ocklahama” and its officers and the “Thielbek” and its officers.

After the libel was filed on behalf of the “Thode Fagelund” a libel was filed on behalf of the owners of the “Thielbek” against the “Thode Fagelund” *in rem* and against The Port of Portland *in personam*. The allegations of negligence contained in this libel are:

1. That the “Thode Fagelund” approached the channel between the stern of the “Chinook” and the Astoria docks in such a manner that she was not under proper control.

2. That she blew two whistles and attempted to cross the bow of the “Ocklahama” and tow when the red light was showing to the “Thode Fagelund”

and her own green light only was showing to the "Ocklahama."

3. That after the passing signals had been given and agreed upon the "Thode Fagelund" altered her course to her own starboard and crowded the "Ocklahama" and "Thielbek" so close to the "Chinook" as to make the passing impossible.

4. That the "Thode Fagelund" reversed her engines full speed astern and did not signal by three whistles that her engines had been reversed.

In its answer to these several libels The Port of Portland pleaded affirmatively the law under which this service was performed and the limitation therein contained and hereinbefore set forth. It further pleaded affirmatively that its pilots were duly licensed and were authorized by virtue of their licenses to undertake the services which they were performing at the time of the collision, and that they were pilots of experience and familiar with the waters in which the collision occurred. Exceptions were filed to these affirmative matters or defenses and said exceptions were sustained by the trial court.

After hearing all the evidence the Court found that the "Thode Fagelund" was alone at fault; that she was not at fault in signaling for a starboard passage, when she should have signaled for a port passage, but that she was at fault in stopping and backing after giving the passing signals and after the passing signals had been accepted, and that she was at fault in failing to give signals to indicate that she

was backing. The Court further held, however, that the negligence of the "Thode Fagelund" should be imputed to Nolan, the pilot having charge of her navigation, and that inasmuch as he was an employee of The Port of Portland, The Port of Portland was responsible for the damages caused by his negligence. Under the opinion of the Court the "Thielbek" and her owners were therefore entitled to recover against The Port of Portland for the negligence of Pilot Nolan, inasmuch as the allegations of the libel against the "Thode Fagelund" and The Port of Portland had been sustained, but none of the allegations in the libel of Wilhelmsen, owner of the "Thode Fagelund" were sustained. Thereupon Wilhelmsen applied, *after the trial and after the opinion of the Court had been rendered*, for leave to amend his libel,—to abandon his original libel indeed, and to allege that the collision was caused by the negligence of Pilot Nolan, that he had charge of the navigation of the "Thode Fagelund," and that the collision was caused by his negligence in the particulars found by the trial court. This application, over the objection and exception of The Port of Portland, was granted and an amended libel filed to conform to the facts proved, and Wilhelmsen was granted a judgment and decree against The Port of Portland upon such finding and upon such amended libel.

While these causes were pending W. R. Grace & Company, time charterer and owner of the greater part of the cargo of the "Thode Fagelund," filed a

libel against the "Thielbek" *in rem* and against The Port of Portland *in personam*, adopting in all substantial respects the allegations of the libel of Wilhelm Wilhelmsen. About the same time E. I. du Pont de Nemours Powder Company, owner of a part of the cargo of the "Thode Fagelund," likewise filed a libel against the "Thielbek" *in rem* and against The Port of Portland *in personam*, also substantially adopting the allegations of the libel of Wilhelm Wilhelmsen. These two libels upon the trial were dismissed, and as the libelant in neither case has appealed these causes may be disregarded upon this appeal, though for the purposes of the appeal these causes are consolidated with the libel filed by Wilhelm Wilhelmsen and the libel filed by the owners of the "Thielbek."

The Port of Portland Not Answerable for Negligence of Its Pilot, Nolan

ASSIGNMENTS III and IV

(APOSTLES, PAGES 132, 133, 258, AND 259.)

The Port of Portland, as has been said, is a municipal corporation created and organized for the purpose of discharging certain duties recognized by the legislature of this state as of a public character. When first created in 1891 the object, purpose, and occupation as defined by Section 2 of the Act of 1891 was to improve the Willamette River at the Cities of Portland, East Portland, and Albina, and the Willamette and Columbia Rivers between said cities and the sea. These functions were purely

public and for this work The Port of Portland received nothing. It was given power to levy taxes to pay the expenses incurred in carrying on the purpose for which it was created, and as a public corporation it was compelled to discharge these duties. Its charter was amended in 1901, and by this act the object, purpose, and occupation of the corporation was declared to be to "promote the maritime shipping and commercial interests of The Port of Portland in all manner as in this act set out and contained or as it may hereafter be thereto specially authorized and empowered." It was given full power over the Willamette River and the Willamette and Columbia Rivers between the southerly boundary line of The Port of Portland and the open sea to the same extent to which the state of Oregon had power. By this Act it was also given power **in its discretion** to acquire, own, erect and operate a drydock, but it was not authorized to operate said drydock for profit and was expressly prohibited from carrying on the work of repairing, cleaning, and painting vessels, an occupation which is usually incident to the ownership and operation of a drydock. Indeed, the Act of 1901 clearly contemplates that the drydock should be operated at a loss, and provision was made to pay expenses by taxation. Discretion, as has been said, was given to The Port in the particular of the drydock, but no discretion in regard to other public functions vested in The Port.

In 1908 the charter of the City of Portland was

again amended, this time by initiative petition, and the powers of The Port were enlarged and extended so that in addition to the powers specifically granted under the Act of 1901 The Port was expressly authorized and empowered, **not in its discretion**, to establish and maintain an efficient towage and pilotage service between its boundaries and the open sea, and was given all powers necessary to carry this Act into effect. These powers, therefore, became recognized as public functions, and as public functions it was the bounden duty of The Port to discharge them, and it could not avoid this duty. The status of The Port, therefore, may be likened, so far as these duties are concerned, to that of vessels navigating certain waters where there is in effect a compulsory pilotage law.

It is true that vessels navigating the waters of Oregon, including the Columbia River, are not compelled to employ pilots at all. In other words, the pilotage law of this state is not a compulsory pilotage law; but in so far as The Port of Portland is concerned the law is compulsory, that is to say, The Port is compelled to maintain an efficient towage and pilotage service between Portland and the sea. To maintain this service it must employ pilots, and under the statutes of the state no one may act as pilot until he has been licensed (II L. O. L., Secs. 5165 and following). The Port cannot license a pilot; pilots must be licensed either by the proper representatives of the United States or by the proper representatives of the several states. Their

qualifications are prescribed by Sec. 5171, II L. O. L.; and under Sec. 5178, II L. O. L., the pilot and the sureties upon his official undertaking are liable for the damages caused by reason of his negligence or incompetency. A pilot's fees are fixed by law; and the law imposing these duties upon The Port of Portland limits the amount of its charges to the charges fixed by the State of Oregon for pilots, so that it is not contemplated that in this service The Port of Portland shall realize any profit. In other words, the duties which The Port performs are compulsory duties, to be performed for compensation not to exceed the cost. The Port therefore contends that under this law it occupies practically the same position which a vessel occupies under a compulsory pilotage act, and that it performs its duty if it furnishes a pilot who is licensed by the state of Oregon and who bears a certificate from the state showing that he has the qualifications to act as pilot.

Under the compulsory pilotage law the owner or master of a ship is not answerable *in personam* for any loss or damage occasioned by the fault or incapacity of any qualified pilot in charge of such ship.

Maclachlan, Law of Merchant Shipping, (5th Ed.) page 293.

Marsden's Collisions at Sea, (6th Ed.) Chapter 10, page 214.

The China v. Walsh, 74 U. S. (7 Wall.) 53.

Ralli v. Troop, 157 U. S. 386.

Homer Ramsdell Transportation Co. v. La Compagnie, 182 U. S. 406.

The W. G. Mason, The W. I. Babcock, 142 Fed. 913.

Guy v. Donald, 203 U. S. 245.

The Port, in other words, contends that when, in the discharge of its public duties, it furnishes to a vessel requesting the same a pilot whose qualifications are certified by the state of Oregon, such pilot becomes, when he goes upon the vessel, not the servant of The Port, but really the servant of the vessel, and that The Port has no power to control his action, and that therefore the doctrine of *respondeat superior* has no application. This would not relieve, of course, the "Thode Fagelund" from liability to the "Thielbek," as the pilot was unquestionably a servant of the steamship, but it would relieve, and, The Port contends, does relieve The Port from any liability for his action or for his negligence.

Furthermore, The Port contends that in the case at bar if there was negligence on the part of Nolan, the pilot of the "Thode Fagelund," there was the same negligence on the part of the master of the steamship "Thode Fagelund." He was present and giving orders to his crew, repeating, as he testifies, the orders of the pilot, and therefore approving and affirming the same, and he testifies that he repeated, and therefore approved and affirmed, each of the orders given by Pilot Nolan. The negligence of which Nolan is found guilty was in violating the

Navigation Rules. See opinion of Court (Apostles, page 90), wherein the Court finds that the negligence of which the "Thode Fagelund" was guilty was: first, in failing to execute the maneuver agreed upon; second, in stopping and backing after exchanging the passing signals, and especially without giving three blasts of her whistle indicating that she was doing so, as required by the Pilot Rules.

The fact that a vessel has a pilot to take charge of her navigation does not place the pilot in command of the vessel, but leaves the vessel in charge of the master. Note the language of Judge (afterwards Mr. Justice) Clifford of the Supreme Court, in 1 Clifford, 491:

"Vessels are not positively bound in any case, by the law of this State, to employ a pilot, whether going in or coming out of a harbor; but when inward bound, and a pilot seasonably offers his services and is ready to enter upon the duty, the ship must pay pilotage fees, even if his services are refused. While on board, the pilot, in the absence of the master, has the exclusive control and direction of the navigation of the vessel; but if the master is present, the power of the pilot does not so far supersede the authority of the master, that the latter may not, in case of obvious and certain disability, or gross ignorance and palpable and imminently dangerous mistake, disobey his

orders and interfere for the protection of the ship and the lives of those on board. Divided authority in a ship with reference to the same subject-matter is certainly not to be encouraged, and can never be justified or tolerated, except in cases of urgent and extreme necessity. While standing by and witnessing a self-evident mistake manifestly and imminently endangering the ship, and certain to cause a collision, the master should not remain silent, but might well interpose, so far at least as to point out the error, and suggest the proper corrective."

Again in *United States v. Forbes*, Crabbe, 558, Randall, J., says at page 561:

"The pilot is an officer of the ship when on board to pilot the vessel to or from the sea, and the crew are bound to obey his orders as such; but when the captain is on board he is master of the vessel, and the orders of the pilot are, in law, considered as the master's."

It should be borne in mind that The Port of Portland is not in the ordinary sense a municipal corporation. It does not belong to the same class of municipal corporations to which cities and towns belong, but rather to that class to which counties and school districts belong. In *Cook v. The Port of Portland*, 20 Ore. 580, the Supreme Court of the state held that The Port of Portland belongs to that class of municipal corporations sometimes called *quasi-corporations organized solely for gov-*

ernmental purposes and that the state at large is vitally interested in the work which The Port is authorized to do, though that part of the state embraced in its boundaries may reap the principal benefit from the moneys expended by The Port. Mr. Dillon in his work on Municipal Corporations, Sections 34 and following, clearly distinguishes between these classes of municipal corporations.

In Dillon on Municipal Corporations, Volume IV, Section 1611, it is said that when a corporation is created by public statute for definite and limited objects, to which its funds are to be applied, a contract which is entirely unconnected with those purposes, or which on its face will cause an illegal or wrongful application of its funds or an application to other objects, is *ultra vires* and void. The same author, Section 1647, states in speaking of the doctrine of *respondeat superior*, that municipal corporations fall within the operation of this rule and are liable accordingly to civil actions for damages when the requisite elements of liability co-exist. To create such a liability, it is fundamentally necessary that the act done which is injurious to others must be within the scope of the corporate powers as prescribed by charter or positive enactment, the extent of which powers all persons are bound, at their peril, to know; in other words, it must not be *ultra vires* in the sense that it is not within the power or authority of the corporation to act in reference to it under any circumstances. If

the act complained of necessarily lies wholly outside of the general or special powers of the corporation, as conferred in its charter or by statute, the corporation can in no event be liable to an action for damages, whether it directly commanded the performance of the act or whether it be done by its officers without its express command. In Section 1649 the author reviews this subject and among other things says:

“It is nowhere denied that a contract *ultra vires*, using the term *ultra vires* in the sense of meaning an act which is both intrinsically, wholly and necessarily beyond the possible scope of the chartered powers of the municipality, does not as such bind the municipality. As to torts or wrongful acts not resting upon contract, but which are *ultra vires* in the sense above explained, we do not see on what principle they can create an implied liability on the part of the municipality. If they may, of what use are the limitations of the chartered corporate powers? Certainly the rules laid down in the text are in accordance with the almost if not universal doctrine of the courts, and are, we think, sound.”

Under the powers conferred upon The Port of Portland by the original act of the legislature, as has been said, The Port had no power to engage in the towage business or in the pilotage business, and had it undertaken to tow the “Thielbek” or to supply

a pilot for the "Thode Fagelund" its act in either case would have been beyond the powers conferred by the legislature, and it would not have been bound either on the contract, if it should have attempted to contract, nor in tort, for negligence. In like manner, had this accident happened in waters which The Port of Portland was not authorized to navigate or to furnish pilots for, The Port of Portland would not have been liable, for the act in navigating the waters or in furnishing pilots for the same would have been *ultra vires*, and the corporation would not have been bound by contract nor liable for negligence.

It is questionable whether the legal voters of The Port of Portland had power to assume the new duties and responsibilities placed upon The Port by the amendment of 1908. It is questionable whether these powers are in their nature governmental.

In the exercise of the powers granted to it by the legislative Acts of 1891, 1893, and 1899, The Port exercised purely governmental powers, and in the exercise of such powers cannot be held liable for the negligence of its employees, for to hold The Port liable for such negligence is against public policy. This rule, that the Sovereign in the exercise of governmental functions cannot be held liable for the negligence of his or its employees, is too familiar to require the citation of authority. Perhaps the best illustration of this principle is the fact that neither the state nor the county is held liable for

the negligence of the sheriff nor indeed for any acts of the sheriff in the course of his official duties. This rule that the Sovereign cannot be held liable has been frequently recognized in admiralty. In *Workman v. New York*, cited *infra*, it is said :

“We, of course, concede that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that court has declined to exercise jurisdiction, but this was solely because of the immunity of sovereignty from suit in its own courts. So, also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that as by the rule of international comity, the sovereign of another country was not subject to be impleaded, no redress could be given.”

In the same case it is said :

“It is not gainsaid that, as a general rule, municipal corporations, like individuals, may be sued ; in other words, that they are amenable to judicial process for the purpose of compelling performance of their obligations. True it is, that under the general law, growing out of the public nature of their duties, where judgments or decrees are entered against municipal corporations, such judgments or decrees may not, as a matter of public policy, be enforced by the

levy on property held by the corporation for public uses."

The property, therefore, of The Port cannot be taken and sold to satisfy the judgment and decree of the Court in this case. This rule was followed in this Circuit in the case of *The John McCracken*, which decision is considered *infra*. How, then, it may be asked, can a judgment or decree in this cause, if rendered against The Port, be satisfied? That it cannot be satisfied by seizure and sale of the tangible property of The Port is plain. Can it be satisfied by taxation?

Under the legislative Acts of 1891, 1893, and 1899, The Port is authorized to borrow moneys to carry on the work of making and maintaining a channel to the sea not exceeding \$500,000.00, and to issue notes and bonds therefor, and it is authorized to assess, levy, and collect taxes annually not exceeding three-twentieths of one per cent. The moneys derived from these taxes are to be used in making and maintaining a channel and paying interest on the moneys borrowed and the principal of the debt when due. None of the moneys derived from this tax can be used to pay claims arising out of torts occurring in the towage and pilotage business.

The amended Act of 1901 undertakes to give The Port the power to build, hold, own, and operate a drydock and also to charge for the use of the same, but it is expressly provided that The Port shall not carry on the work of repairing, cleaning, or painting vessels. The same Act gives The Port

power to contract with the government of the United States for all or any part of the work of making and maintaining the channel, but the moneys derived from this source, if any, go into the fund with the moneys raised by the tax and must be expended in the same way. For the purpose of acquiring a site for and building a drydock The Port is by this Act authorized to borrow money not exceeding \$400,000.00, but the Act prohibits The Port from borrowing moneys for any other purposes. This Act also limits the taxing power of The Port to three-twentieths of one per cent, and restricts the purposes for which the moneys derived from this tax shall be used. The Port by this Act is also authorized to assess, levy, and collect an additional tax, the moneys derived from which shall go into a special fund known as the drydock fund, and this money can be used only for the payment of the interest and principal of the drydock bonds. The Port is also by this Act authorized to levy a special tax to build a new dredge, the moneys realized from the tax to go into a dredge fund and be used only for dredge fund purposes. Thus it appears that the moneys of the drydock fund can be used only for drydock purposes and the moneys in the dredge fund only for dredge purposes.

By the amendment of 1908 The Port is authorized to engage in the pilotage and towage business on the Columbia and Willamette Rivers and to charge and collect compensation (limited by the Act) for services of this character rendered by it.

It is a grave question whether the people had power to enact such an amendment, for the powers so assumed by the people are not governmental, but entirely different from those for the exercise of which The Port was created. If The Port has such powers there is no reason why a county or a school district might not assume like powers, or why an irrigation district or a drainage district might not in like manner enlarge the powers granted to it by the law under which it was incorporated. The fact that the people of the state have by constitutional amendments provided that the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, and that by Section 1a of Article IV the people have further provided that the initiative and referendum powers reserved to the people by the constitution are further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation of every character, in or for their respective municipalities and districts, does not authorize the people of a municipality or district to organize themselves into a municipality or district for purposes other than those for which such municipality or district was created. This doubt is corroborated by Article XI, Section 2, which provides that the legal voters of every city and town, but not the legal voters of other municipal corporations, are granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the state

of Oregon. It would seem that the proper construction to put upon these constitutional amendments is that the legal voters of a municipal corporation have the right to enact local, special, and municipal legislation provided they keep within the powers for which such municipality was created, but that to assume powers other than those granted is to allow the people to create governmental districts, which would result in their passing laws antagonistic to one another and to the general constitution and laws of the state, a result which is not within either the letter or the spirit of the amendments. Such a construction would lead to conflicts between municipalities and to governmental chaos.

By this last amendment The Port is authorized to provide tug-boats and pilot-boats and place the same in condition for use, and to sell bonds to the extent of \$500,000.00. By this amendment it is also authorized to engage in the pilotage and towage business on the Columbia and Willamette Rivers, and to charge and collect for services of this character. To carry into effect its new powers conferred by this Act it is authorized to assess, levy, and collect a tax not to exceed one-fortieth of one per cent, and in addition thereto a special tax to pay the interest on the towage and pilotage bonds and the principal of said bonds as they mature. The moneys derived from this special tax, however, can be used only to pay the interest and principal of these bonds, but there seems to be no limitation on the use of the

moneys derived from the tax of one-fortieth of one per cent.

From the foregoing analysis of these several acts it appears to us clear (1) that to pay claims for damages arising out of any business which The Port may conduct, The Port can use only the funds derived from the tax of one-fortieth of one per cent authorized by the Act of 1908, and (2) that the moneys derived from these taxes is to carry on the towage and pilotage business conducted by The Port. In other words, they must continue this business and must provide funds for this purpose. If so, the moneys in this fund can be used only in so far as the same may not be needed to conduct the towage and pilotage business.

The amendment of 1908 intended to confer upon The Port powers and duties which are not governmental in their nature, but in adopting this amendment the people or legal voters intended also to limit the liability of The Port for damages resulting from the negligence of its employees.

Sutherland in his work on Statutory Construction, Section 325, says:

“(Expressio unius est exclusio alterius.)

The maxim is applicable to a statutory provision which grants originally a power or right. In such cases the power or right originates with the statute, and exists only to the extent plainly granted. * * * Where a statute authorizes a public work, and points out a mode

in which parties injured thereby may obtain compensation, that remedy is exclusive, and the scope of the remedy or points of compensation are confined to the statutory limits. * * * Every part of a statute must be viewed in connection with the whole, so as to make all its parts harmonize, if practicable, and give a sensible and intelligent effect to each. It is not presumed that the legislature intended any part of a statute to be without meaning."

The same author, Section 371, says:

"If a statute creates a liability where otherwise none would exist, or increases a common law liability, it will be strictly construed. * * * The courts will not extend or enlarge the liability by construction; they will not go beyond the clearly expressed provisions of the act."

The same author, Section 390, says:

"Statutes which impose burdens, or liabilities unknown at common law, are construed strictly in favor of those on whom such burdens are imposed, or in favor of those who are subjected to such liabilities."

And in Section 398 the author emphasizes the rule that where rights depend upon the statutes creating them, these statutes are construed strictly.

In *The John McCracken*, 145 Fed. 705, on motion to vacate warrant of arrest, Wolverton, Dis-

trict Judge, cites and follows the case of *Cook v. The Port of Portland*, 20 Or. 580, to the effect that "all the purposes and powers of The Port of Portland are public, political or governmental," and on page 708 says:

"Thus it appears that the national government is as careful that the functions of the state governments, and the instrumentalities by which they are exercised and controlled, shall not be impinged upon, and their powers hampered and impeded, as it is jealous that its own organism be not shorn of any of its authority or fettered in the maintenance of its supremacy. * * * Indeed, it appears to me that the policy of the general government is in consonance with this view and that under that policy it is bound to accord to the municipality the same defense as if the libelant were a private suitor proceeding against the ships of such municipality."

In *United States v. Port of Portland*, 161 Fed. 193, libel *in personam* was brought against The Port of Portland for damages arising out of the same collision as the subject-matter of the suit of *The John McCracken*, *supra*. The District Court held that in the navigation of the dredge "Columbia," while in tow of the tug "McCracken," the employees of The Port of Portland were negligent, and entered a decree *in personam* against The Port of Portland, but the questions now raised were not

raised in the *McCraken* case, nor upon the appeal of that case (176 Fed. 866). The only issues involved were the responsibility for, or, to speak more accurately, the cause of, the collision and the amount of resulting damages, it seemingly being conceded that if the employees of The Port of Portland were negligent in the navigation of the dredge and tow-boat The Port of Portland must respond in damages. No limitation of liability was pleaded in this case, as it arose prior to the amendment of 1908.

The case at bar presents several questions not raised either in *The John McCracken* or in *United States v. The Port of Portland*. The first of these is whether or not The Port of Portland had power to engage in the towage or pilotage business. If it had no such power its acts were *ultra vires* and The Port would not be responsible; but, granting that it had such power, the power was conferred upon it by a public statute of which all persons must take notice, and the limitation contained in the statute is binding upon all persons who contract with The Port. (*Sutherland, Statutory Construction*, Sections 325, 371, and 390, *supra*. And in Section 398 the author emphasizes the rule that where rights depend upon the statutes creating them these statutes are construed strictly.)

Assuming that the "Ocklahama" and "Thielbek" were not at fault, the owners of the "Thielbek," if The Port had the power to engage in the business of pilotage, could recover from The Port

of Portland all damages sustained by the "Thielbek" through the negligence of Pilot Nolan, and the limitation would not apply in such case in so far as the damages were sustained by the "Thielbek," but the owners of the "Thode Fagelund" would not be entitled to recover any damages, or if entitled to recover any damages would be entitled to recover only damages within the statutory limitation. When the master of the "Thode Fagelund" contracted with The Port of Portland to furnish a pilot he is presumed to have contracted with full knowledge of the power of The Port and of the limitation upon its responsibility, and in order to recover he must rely upon the contract which he made with The Port of Portland and under which the pilot, Nolan, was furnished to him.

A familiar illustration of this rule is found in the case of torts of infants. An infant is liable in tort to the same extent as a person of full age and legal capacity would be, but if the wrong grows out of contractual relations and the injury consists in the non-performance by the infant of a contract into which the party damaged has entered with the infant, or if it results from the negligent manner in which the infant has performed such contract, the law will not permit the contract to be enforced indirectly when it cannot be enforced directly, and therefore will not hold the infant liable if it be necessary to prove the contract in order to establish the tort. (Cooley on Torts, page 123.) Upon this principle it has been uniformly

held that the doctrine of *respondcat superior* has no application in the case of an infant employer, and that therefore he is not responsible for torts or negligence on the part of those in his service; for the relation of master and servant depends upon contract, and in order to hold the infant responsible it is necessary of course to prove the contract.

To hold The Port liable for damages resulting from the negligence of Nolan it is necessary to prove a contract between Nolan and The Port of Portland, that is to say, to prove that Nolan was employed to pilot ships under a contract with The Port of Portland. If The Port had no power to engage in the business of towing ships its contract with Nolan was *ultra vires*, and therefore the doctrine of *respondcat superior* would have no application; and in that event neither the "Thielbek" or its owners nor the "Thode Fagelund" or its owner could recover damages from The Port of Portland; for in order to impose the liability upon The Port of Portland it would be necessary to prove the contract of employment under which Nolan was acting, and as such contract would be *ultra vires* The Port would not be bound. If, however, The Port had power to engage in the business of pilotage the contract between Nolan and The Port under which Nolan was employed could be proved, for it would not be *ultra vires*, and anyone sustaining injury or damage through the negligence of The Port's employee could recover damages. The amount of such damages, so far as the "Thielbek" and its

owners are concerned, would not be limited. The "Thode Fagelund" and its owner, however, stand upon a different principle and in a different situation. The master of this steamship entered into a contract with The Port of Portland, which contract he would be allowed to show. He would therefore be entitled to recover such damages as he could prove had been sustained by his ship up to the limitation of The Port of Portland's liability; but as the Act passed by the initiative giving this power to contract limits the liability for damages, parties contracting with The Port would be bound by the limitation and could recover no more than the amount which the Act permits.

ARGUMENT

The Cause of the Collision

ASSIGNMENTS IV AND V

(APOSTLES, PAGES 132 TO 133, AND 258 TO 259.)

The facts are quite fully found in the opinion of the Honorable Robert S. Bean (Apostles, pages 86 and following). Of the findings of fact The Port of Portland does not complain. Due consideration was given to all the evidence and the findings are fully supported by the evidence.

The Port of Portland submits, however, that the trial court failed to distinguish in its opinion between negligence and error of judgment on the part of those in charge of the navigation of the "Thode Fagelund." It finds (Apostles, page 90) that it is probably true that the close proximity of the "Thode

Fagelund" to the "Chinook" when the "Ocklahama" was sighted, the necessity of her going to port to clear the "Chinook," and the difficulty of thereafter swinging to starboard, justified a departure from Pilot Rules IV and X, and that up to the time that the passing signal was given there was no negligence on the part of those in charge of the "Thode Fagelund." The negligence charged, therefore, against the "Thode Fagelund" is:

First, her failing to attempt to execute the maneuver agreed upon, that is to say, that when the passing signals were given and agreed on it was the duty of the "Thode Fagelund" not to stop and back but to continue upon her course in accordance with the signals exchanged.

The Port of Portland claims that this does not constitute negligence, but rather an error of judgment.

One of the earliest cases distinguishing between negligence and error of judgment is *Reeves et al. v. The Ship "Constitution,"* decided in 1835 by Hopkinson, J., and reported in Gilpin's Reports, page 579 and following. The Court says, page 587:

"Do these facts make out a case of such negligence as will entitle the libelants to the indemnity they seek? I should say, they do not; for, supposing the pilot acted with good faith, and with his best judgment, which is not questioned, and granting that he misjudged, and miscalculated his chance of getting clear of the schooner, yet it was a mistake which, in such

a situation, where the chances were so nearly balanced, as we shall see, the most prudent man might have made in his own concerns. It discovers no such want of diligence as to be imputed as a fault in any man. He saw danger and difficulty on both sides; two evils to be avoided; he honestly, with his best judgment and skill, endeavored to avoid both, and betrayed neither carelessness nor ignorance in the attempt, although it was not successful. It is not uncommon for the best and wisest designs to miscarry."

In *The Packer*, 28 Fed. 156, Wallace, J., at page 160, says:

"But the tug is not to be held liable upon conjecture, nor is negligence to be imputed to those in charge merely because it appears, after the event, that the accident might not have happened if something had been done which was omitted. The question is whether they did all that other prudent and intelligent men would have ordinarily deemed it necessary to do under the same circumstances. Upon the proof this question should be answered in the affirmative."

In *The Startle*, 115 Fed. 555, the Court, by Gray, Circuit Judge, says on page 563:

"We see nothing in the facts disclosed in the record in this connection, which would justly impugn the fairness of the judgment

exercised by him under the circumstances detailed, nothing to show that he acted outside the limits of a fair discretion, in regard to what should be done under the circumstances that surrounded him. Even if, in the light of subsequent events, the course pursued by the captain of the tug should appear to have been a mistaken one, a mere mistake is not enough to charge the tug with the loss which followed. To make the tug liable, the error must be one which a careful and prudent navigator, surrounded by like circumstances, would not have made."

The leading case on this question is *The Grace Girdler*, 74 U. S. (7 Wall.) 196, decided by Mr. Justice Swayne. The Court says:

"The witnesses upon each vessel must have known the condition of things and what occurred there. Unless we impute perjury, which we see no reason to do, they are entitled to credence as to this class of facts. As to what occurred upon the other vessel they are liable to be mistaken, and their testimony is entitled to less weight than the testimony of witnesses who were present.

"In respect to the yacht, we pass by the inquiries whether she was properly manned, whether she had a sufficient lookout, and whether, by due vigilance and good seamanship she might not at her leisure have given the fer-

ryboat a safe berth, and thus have avoided the necessity of placing herself, as it were, by a leap, across the bows of the schooner. These points have not been pressed upon our attention by the learned counsel for the appellants, and in the view which we take of the case their solution is not necessary to its proper determination. The testimony of those on board of the yacht proves clearly that all was done in the emergency that was practicable and proper. *If there was any omission, under the circumstances it was an error and not a fault. In the eye of the law the former does not rise to the grade of the latter, and is always venial.* *Reeres v. The Constitution*, Gil. 587; *N. Y. & L. S. Co. v. Rumball*, 21 How. 383 (62 U. S. XVI, 148); *Gen. Chief v. Fitzhugh*, 12 How. 461. * * *

“Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances—such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view—the safety of life and property. *The Europa*, 14 Jur., 629; *The Virgil*, 2 W. Rob. 205; *The Lochlibo*, 3 W. Rob. 318; *The W. V. Moses*, 6 Mitch. Mar. Reg. 1553. Where there is a reasonable doubt as to

which party is to blame, the loss must be sustained by the party on whom it has fallen. *The Catherine of Dorer*, 2 Hagg. 154."

Other cases to the effect that an error of judgment on the part of the master of a tug will not make the tug liable, unless the error is so gross that it would not have been made by a master of ordinary prudence and judgment, are:

The E. Luckenbach, 109 Fed. 487, same case
113 Fed. 1017, 51 C. C. A. 589.

The W. E. Gladwish, *The F. B. Thurber* and
The Francis King, 17 Blatchford, 77.

The Czarina, 112 Fed. 541.

The Battler, 72 Fed. 537, 19 C. C. A. 6.

The Wilhelm, 47 Fed. 89.

The Mohawk, 7 Ben. 139.

The Frederick E. Ives, 25 Fed. 447.

The Mosher, 4 Biss. 274.

The Worthington v. The Davis, 19 Fed. 836.

Neel v. Blythe, 42 Fed. 457.

The Sylfid, 169 Fed. 995.

The Olympia, 52 Fed. 985.

The Yacht Clytie, 10 Ben. 588.

The Columbus, 1 Abb. Adm. 384.

It is doubtless true that had the "Thode Fagelund" continued upon the course agreed upon she would have safely passed to starboard of the "Thielbek" and "Ocklahama." Nolan's judgment, therefore, when he first sighted the "Thielbek" and "Ocklahama" was correct; it was equally correct when

he gave the first passing signal; it was equally correct also when he gave the second passing signal. After giving the second passing signal, however, he changed his judgment, and honestly believed that he could not make a starboard passing safely. In this he was in error, as shown by the evidence and as correctly found by the trial court, but this error was not negligence, only an error of judgment, and in his judgment in this particular he is sustained by the testimony of Hansen, the master of the "Thode Fagelund," who also was on the lookout and who sighted the "Thielbek" and "Ocklahama" at the same instant at which these vessels were sighted by Nolan. This witness testifies: (Apostles, page 484.)

"Q. At that time" (witness' attention is called to the position when he first saw the "Thielbek") "and under the circumstances that you have described, what was it that you could have done to have avoided a collision?"

"A. We could not do anything to avoid it. There wasn't anything else to be done."

This testimony is confirmed by his letter to Pilot Nolan dated September 13, 1913 (Apostles, page 878), wherein he says:

"I beg to say that I have no fault whatever to find with you, and approve of what you did at that time while acting as my pilot."

Briefly summing up the contention of The Port of Portland on this subject, it appears that the

"Thode Fagelund" sighted the "Ocklahama" and "Thielbek" at practically the same instant at which the "Ocklahama" sighted the "Thode Fagelund." At that time all the lights of the "Ocklahama" and her tow were in sight of those on the "Thode Fagelund" but only the range lights and the green light of the "Thode Fagelund" were in sight of those on the "Ocklahama." Under these circumstances the proper passing signal should have been one whistle and the vessels should have passed port to port, but at this time the "Thode Fagelund" was above the dredge "Chinook" and it was necessary for her to pass aft of this dredge on a course which would have taken her toward the Astoria shore and directly in the course of the "Ocklahama" and "Thielbek." After passing aft of the "Chinook," in order to pass port to port it would have been necessary for the "Thode Fagelund" to have changed her course entirely and practically almost at right angles, that is to say, though the vessels might have passed port to port, the "Thode Fagelund," to accomplish this passing, would have been in imminent danger of colliding with the dredge at anchor. The passing signal given was therefore correct. The situation had not changed materially at the time the second passing signal was given and answered; but after the second passing signal was given those in charge of the navigation of the "Thode Fagelund" apprehended from what they saw of the "Thielbek" and "Ocklahama" that in order to pass safely to starboard it was nec-

essary for the "Thode Fagelund" to reduce her speed so as to give the "Ocklahama" and "Thielbek" an opportunity to get out of her way. Accordingly, realizing the danger apparently almost as soon as the signals had been exchanged, the "Thode Fagelund" reversed her engines and gave a danger signal, and soon thereafter, in order further to reduce her speed and give more time for the "Ocklahama" and "Thielbek" to change their course according to the signals, the "Thode Fagelund" let go her port anchor and again gave a danger signal. These maneuvers were proper maneuvers if the situation was as believed by the pilot on board the "Thode Fagelund" and by her master, but in reality both the pilot and the master were in error in judging the danger.

It is significant that the orders given by the pilot were directly in conflict with the Rules of Navigation, were known by him to be in conflict therewith, and were so recognized by the master of the "Thode Fagelund." In other words, the situation at the time that they sighted the "Thielbek" and "Ocklahama" was, in the judgment of these experienced mariners, extraordinary, and in their judgment they were "called upon to act in an emergency and had to face perils unexpected." The situation, indeed, when they got a full view of the "Thielbek" and the "Ocklahama," was one of surprise, and in consequence the pilot, acting in good faith and with his best judgment, miscalculated his chance on passing and adopted the course which he should not have adopted, but which other mariners of equal experi-

ence, as for example the master of the "Thode Fagelund," would have adopted under the same circumstances.

Second, the act of negligence imputed to Pilot Nolan by the trial court is that while backing full speed astern he failed to signal this fact to the "Ocklahama" by giving three blasts of his steam whistle. The opinion of the Court does not point out in what particular this act of negligence caused or contributed to the collision. The undisputed evidence in the case is, and it is so found by the Court, that from the time that the first passing signals were exchanged between the two boats the "Ocklahama" changed its course to port and was doing all that it could to aid in the maneuver agreed upon. It could not have done more to have avoided the collision had it known that the "Thode Fagelund" was backing. It is submitted that this act of negligence did not cause or contribute to the collision. Every step taken by the pilot of the "Thode Fagelund" was communicated to the master of the "Thode Fagelund" who was on the bridge in charge of his vessel and in a position to act and to act promptly. He did not see fit to act, indeed he fully endorsed every action taken by the pilot; and this is fully established by his testimony and by his letter in which he says that he has no fault to find with the pilot and approved of what he did at the time while acting as his pilot (*supra*, Apostles, page 878).

It is respectfully submitted that the true cause

of the collision was the position of the "Chinook" in the channel of the river. It is found by the trial court that this dredge was in such a position that vessels approaching from either side of her could not sight one another over her because of her height. At the time when they did sight one another it is probable that the collision could have been avoided only by the "Thode Fagelund" making a starboard passage. This she attempted to do, and in this attempt she was assisted as far as could be by the "Ocklahama" and "Thielbek." It is true that had the "Thode Fagelund" continued upon the course which she was then pursuing the collision would probably have been avoided, and that she could have escaped the collision in no other manner; but after initiating this maneuver both the pilot on the "Thode Fagelund" and the master of this vessel, exercising their best judgment, concluded that the maneuver could not be successfully carried out. They therefore agreed that the only course which could be adopted to avoid the collision was to check the speed of the "Thode Fagelund" as far as possible and, in order to do this, reverse and back full speed astern and throw out an anchor. That they did what they thought they should have done under the circumstances is not denied; that what they did do caused the collision is fully established by the evidence and found by the trial court. The error which they committed therefore and which caused the collision was not due to negligence, and if it

was not due to negligence The Port of Portland should not be responsible.

Limitation of Liability

ASSIGNMENTS I AND II

(APOSTLES, PAGES 131 AND 132; I AND II, APOSTLES, PAGES 257 AND 258.)

ASSIGNMENTS VII, VIII AND IX

(APOSTLES, PAGES 133 AND 134.)

ASSIGNMENTS VII, VIII, IX AND X

(APOSTLES, PAGES 259 AND 260.)

In the answer in this cause The Port of Portland pleaded the law under which it was authorized to carry on the business of towage and pilotage. Exceptions were filed to these portions of the answer and these exceptions were sustained by the trial court. The question was raised again upon the hearing upon the merits. In sustaining the objections and in ruling against the contention of The Port of Portland in this particular the learned judge relied upon the case of *Workman v. New York*, 179 U. S. 552, and in stating his conclusions said:

“If, as held in this case, state laws and decisions cannot exonerate a municipality owning an offending vessel from liability in admiralty for a tort committed by such vessel, it would seem logically to follow that such a law limiting the amount of recovery and thus affecting the relief to be granted is not binding on an admiralty court, where the wrongdoer is subject to the

jurisdiction of such court and the proceeding is in accordance with the maritime law.”

The question involved is one of great importance, not only to The Port, but through it to the people of Portland. The principle to be by this honorable Court’s decision announced will extend far beyond the limits of the case at bar—so far, in fact, that it is not believed this Court will be willing to let it rest on the sole authority of the one case cited, particularly when, as is submitted, a critical examination of the actual *rationes decidendi* of that case will show its authority to be confined within very narrow limits. In fact, the exact questions raised and settled by the *Workman* case do not, it is believed, properly govern the case at bar.

In *Workman v. New York*, 179 U. S. 552, the city of New York was held liable *in personam* for damages occurring in New York harbor due to the negligence of those in charge of a fire boat. The District Court assumed that the law of New York controlled, and *held* that by that law the city was liable. The Circuit Court of Appeals of the Second Circuit (14 C. C. A. 530, 67 Fed. 348) expressly said (Wallace, J., at page 531 of 14 C. C. A.):

“That the suit is brought in a court of admiralty instead of a common law court, and that the negligence consisted in the improper navigation of the vessel, are considerations which cannot affect the conclusion.”

The Court then went on to decide that the city, under the New York decisions, was not liable for the negligent handling of its fire boat, being, as regards that particular business, engaged in the exercise of governmental functions.

Mr. Justice White, in stating the opinion of a majority of the Supreme Court (Mr. Chief Justice Fuller, with Justices Harlan, Brown and McKenna), was very careful to lay down the exact questions to be decided:

“We come then to consider first, whether, in the decision of the controversy, the local law of the city of New York or the maritime law shall control; and second, if the case is solely governed by the maritime law, whether the city of New York is liable.”

The issue the learned justice stated thus:

“Does the local law, *if in conflict with the maritime law*, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (Art. 3, Sec. 2) upon the courts of the United States?”

This language makes it clear that the Supreme Court intended to hold, and did hold, that *where a local statute conflicts with the maritime law, a court of admiralty, having secured jurisdiction, will*

be governed by the latter, and not the former, in the administration of maritime rights and duties.

Here there is no question of The Port of Portland's escaping all liability on the ground of sovereignty unless held by the general maritime law. On the contrary, The Port has no desire to disclaim liability on any grounds other than those disclosed by the evidence and noted in this brief; but it is insisted that The Port, if adjudged liable in spite of such evidence, cannot and should not be deprived of the protection, namely, the limitation of its liability, afforded by the very law by which it was created and under which it was operated at the time of the collision.

It is very plain that the *Workman* case presented a very different situation. The contention there was summed up by Mr. Justice White as follows:

“Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts, and when the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular state or the course of decisions therein. And this, not because, by the rule prevailing in the state, the wrongdoer is not gen-

erally responsible and usually subject to process of courts of justice, but because in the commission of a particular act causing direct injury to a person or property it is considered, by the local decisions, that the wrongdoer is endowed with all the attributes of sovereignty, and therefore as to injuries by it done to others in the assumed sovereign character, courts are unable to administer justice by affording redress for the wrong inflicted."

The dangers inherent in even the implied acceptance of such a doctrine need no elaboration. They are very forcibly stigmatized farther on in Mr. Justice White's opinion; the two English cases cited by him are said to point out "the evil consequences growing from thus implanting in the maritime law *the doctrine that wrong can be done with impunity*" (italics ours). As stated above, however, *this appellant makes no such claim to immunity from liability*. Therefore the reasoning that led to the *Workman* decision does not apply to the case at bar.

Aside, however, from questions of legal doctrine, the truth of appellant's contention that the *Workman* case was not intended to govern cases like the one at bar becomes more and more evident when the facts surrounding that decision are examined. In the long and exhaustive dissenting opinion, written by Mr. Justice Gray, for himself and Justices Brewer, Shiras, and Peckham, the sole question raised is as to the liability of a municipal corporation for the negligence of its fire department. The

learned Justices, after a very careful review of the authorities, agreed that for such negligence a municipal corporation, being, as to the prevention of fires, in the exercise of a governmental function, could not, in the absence of statute, be held liable; and they concurred with the Circuit Court of Appeals that the fact that the suit lay in admiralty did not affect that conclusion. The matter contained in this dissent shows very plainly what were the two positions taken by the divisions of the Court. The majority considered that the admiralty had the power to grant needed relief which would not, without the exercise of the admiralty jurisdiction, be forthcoming. The minority believed that no such relief should, on principle, be granted, whether it was applied for in admiralty or not. Clearly none of the Justices apprehended that the majority opinion entailed the acceptance of *the astonishing proposition that, where relief was already foreseen and provided for by a local statute, on certain agreed terms, the admiralty, in recognizing the liability for such relief and in confirming the same, should also have power utterly to disregard the terms upon which such relief was originally predicated?*

The second ground for upholding appellant's interpretation of the *Workman* decision proceeds from a critical examination of the cases cited by Mr. Justice White as bearing on this feature of his opinion. And surely here, if anywhere, will be found justification for the application heretofore made—wrongly, as we think—of this case; for, since

none of the language used by Mr. Justice White will bear any interpretation other than that for which appellant contends, no other interpretation can be fathered on the decision, unless the cases quoted by him exhibit a different doctrine.

The first case cited (after the two English cases hereinabove referred to) is that of *Young v. The Key City*, 81 U. S. (14 Wall.) 653, where it was held that in enforcing a lien for breach of a contract of affreightment courts of admiralty are not bound by any particular statute of limitation.

That this decision is merely in accord with the general principles of admiralty, and does not apply to the case at bar, is clearly shown by Mr. Justice Miller's statement of the propositions involved:

"We think that the following propositions as applicable to the case before us may be fairly stated as the result of these authorities:

"1. That while the courts of admiralty are not governed in such cases by any Statute of Limitation, they adopt the principles that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defense.

"2. That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case.

“3. That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under shorter time, and a more rigid scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued.”

There, as in the *Workman* case, the admiralty exercised its power to further the ends of justice, and to prevent the party liable from *escaping all liability by setting up a state statute of limitation*—a very different thing from invoking the admiralty jurisdiction for the purpose of destroying one of the statutory conditions of this appellant’s existence, particularly when such condition, far from purporting to absolve appellant from all liability (as in the *Workman case*), is rather an admission of liability—in the proper circumstances. This admission, being made before the event, is, according to one of the commonest principles of business honesty, made with a reservation. No situation is more common in mercantile transactions, or more universally accepted; yet this Court, sitting in admiralty, is asked to ignore it—and on what grounds? Surely not on the authority of *Young v. The Key City*.

The next case cited is *The Lottawanna, Rodd v. Heartt*, 88 U. S. (21 Wall.) 558. The language used in that case by Mr. Justice Bradley is largely quoted by Mr. Justice White in support of the desirability of

a uniform system of admiralty law; but the precise holding of the case is no more than that a state lien for materials, *not having been perfected under the state law*, could not be enforced in admiralty. By way of *dictum*, it was also held that, even had such lien been perfected under the local statute, the 12th Admiralty Rule, as in force at the time, precluded its enforcement in admiralty. It will be seen that this decision is very far from holding that the admiralty jurisdiction, once having attached, will operate to break down the safeguards and reliefs afforded by the state statutes. Indeed, the tenor of the whole opinion is quite the contrary. Mr. Justice Bradley, having disposed of the case on the first ground as above noted, went on to say:

“Had the lien been perfected, and had the Rule not stood in the way, the principles that have heretofore governed the practice of the district courts exercising admiralty jurisdiction, and which have been repeatedly sanctioned by this court, would undoubtedly have authorized the material men to file a libel against the vessel or its proceeds. * * * State laws, it is true, cannot exclude the contract for furnishing such necessities from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts so as to enable them to proceed *in rem* for the enforcement of liens created by such state laws, for it is exclusively conferred upon the District

Courts of the United States. They can only authorize the enforcement thereof by common law remedies, or such remedies as are equivalent thereto. *But the District Courts of the United States having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by state laws*" (italics ours).

The true view of situations such as that presented by the case at bar is very clearly set forth a little later on in the opinion. In fact, it is submitted that in the passage about to be quoted Mr. Justice Bradley has put his finger on the exact distinction governing this appellant's position:

"It would, undoubtedly, be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted (supposing Congress to have the power) the authority of the States to legislate on the subject seems to be conceded by the uniform course of decisions.

"Indeed, there is quite an extensive field of border legislation on commercial subjects (generally local in character) which may be regulated by state laws until Congress interposes, and thereby excludes further state legislation. Pilotage is one of the subjects in this category. So far as Congress has interposed, its authority is supreme and exclusive; but where it has not done so, the matter is still left to the regulation

of State laws. And yet this exercise by the States of the power to regulate pilotage has not withdrawn the subject and, indeed, cannot withdraw it from the admiralty jurisdiction of the district courts."

It is the very subject of pilotage that the state of Oregon has regulated by the statute creating this appellant. Under the doctrine voiced in *Rodd v. Heartt*, the case quoted most at length in the *Workman* decision, *the admiralty court not only has jurisdiction, but is bound to recognize and enforce the Oregon statute.*

In *The Montana, Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, it was held that by the general mercantile law and the fundamental law of common carriers such a carrier cannot stipulate for immunity from the consequences of its own or its servants' negligence, and that therefore the admiralty, having secured jurisdiction, would proceed according to the general mercantile law and not according to the law of New York state. On this point Mr. Justice Gray, speaking for the Court, said:

"It was argued for the appellant that the law of New York, the *lex loci contractus*, was settled by recent decisions of the Court of Appeals of that State in favor of the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from all liability for his own negligence." (Citing authorities.)

“But on this subject, as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the State, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the State have concurrent jurisdiction, and upon a contract made and to be performed within the State.” (Citing authorities.) “The decisions of the State courts certainly cannot be allowed any greater weight in the federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the Constitution of the United States.”

The opinion goes on to make it clear that it is not founded on any general maritime law. Indeed, Mr. Justice Gray expressly states:

“There is not shown to be any such general maritime law.”

The ground for the decision is nothing more nor less than public policy. The Court, having decided that the contract, being made in the United States, should be governed by the law of that country, proceeds to exercise its power *as a Federal Court* to declare what that law is, in spite of contrary decisions in the New York state courts. Mr. Justice Bradley says:

“Our conclusion on the principal question in the case may be summed up thus: Each of the bills of lading is an American and not an English contract, and, so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country. By our law, as declared by this court, the stipulation by which the appellant undertook to exempt itself from liability for the negligence of its servants is contrary to public policy and therefore void; and the loss of the goods was a breach of the contract, for which the shipper might maintain a suit against the carrier. This being so, the fact that the place where the vessel went ashore, in consequence of the negligence of the master and officers in the prosecution of the voyage, was upon the coast of Great Britain, is quite immaterial.”

It will readily be seen that this case, no more than the others so far examined, has any bearing upon the one at bar. The Supreme Court of the United States, having jurisdiction, simply disagrees with and overrules the courts of a state on a question of substantive law, thereby affording redress where otherwise none would be. Surely this affords no ground for asking a Federal Court to disregard and nullify a statute of the *locus*, thereby removing safeguards and guaranties which were created and imposed on this appellant, together with concomitant liabilities and duties, by such statute, and which

have consequently been relied upon by this appellant.

Butler v. Boston & S. Steamship Co., 130 U. S. 527, the next case cited by Mr. Justice White, held that the law of limited liability applied to claims for damages due to loss of life as well as loss of cargo. A local statute, fixing certain liabilities on common carriers of passengers for loss of life, was pleaded. After deciding as above, Mr. Justice Bradley said:

“It is unnecessary to consider the force and effect of the statute of Massachusetts over the place in question” (*i.e.*, the place of collision).

Obviously no state statute, *where in conflict with the Federal statute*, should control; but again this is not the case at bar.

In the next case cited, *The Max Morris*, 137 U. S. 1, it was held that a libelant's contributory negligence was no bar to his recovery in admiralty, but that the damages should be divided according to the familiar rule. This decision was arrived at on the grounds of general justice, and furnishes another illustration of the fact that *the admiralty courts will use their broad and untrammelled powers to further justice between the parties*—not, as libelants ask this honorable Court to do here, to promote injustice and confusion in the law of business relations. In fact, as noted later on by Mr. Justice White, *The Max Morris* holds that

it was "*the duty of the admiralty courts to grant relief*"—following out the principle suggested in *Rodd v. Heartt* and remarked upon *supra* in this brief. In other words, the sole rule for the guidance of courts of admiralty is that they shall use their somewhat vaguely-defined powers *to prevent miscarriage of justice*. Clearly, then, *The Max Morris* essentially supports the contention of appellant.

The J. E. Rumbell, 148 U. S. 1, next cited, held that liens granted by a state statute and attaching before the recording of a mortgage took precedence of such mortgage, and were enforceable in admiralty. Here, again, the admiralty is found recognizing and enforcing liabilities created by state statutes. The Court, speaking by Mr. Justice Gray, considered it unnecessary to dwell upon the question as to whether the lien so enforced, is a maritime one, though simply imposed by a state statute upon a maritime contract,

"inasmuch as the lien in question is given precedence over mortgages, by the express terms of the statute of Illinois, as well as by the principles of the maritime law and the practice in admiralty."

Mr. Justice Gray quotes at some length from the opinion of Judge Matthews in *The Guiding Star*, 18 Fed. R. 263, where, in enforcing a lien given by a state statute, that Judge said (at page 266) :

"The claims" (i. e. statutory liens arising in home ports, and maritime liens arising in for-

eign ports) "are in their character, both classes being maritime, alike, and of equal merit. The lien is given by the law, and, although the source of one is the maritime law, and that of the other a local statute, nevertheless they are both so distinctively of a maritime nature that they are exclusively cognizable in the admiralty courts.

"The statute which gives a lien to secure the claims of the domestic creditor, does not recognize any such distinction; and the admiralty rule which authorizes its enforcement in the admiralty courts, provides equally for all suits by material men for supplies or repairs or other necessities, without any distinction in consequence of their claims arising in a foreign or home port. In both cases the lien is given by the law administered in admiralty courts, and there is no circumstance, it seems to me, that takes from the local law its equal force and effect with that of the general maritime law. It is because the latter, by virtue of its own principles, recognizes the efficacy of the local statute to confer the lien, that courts of admiralty acquire jurisdiction to enforce it at all; in doing so, they are in fact, enforcing the general maritime law, and that law, in adopting and enforcing the lien given by the local law, incorporates it into its own system, and puts it on the same footing as if it had been given by the maritime law originally."

It seems obvious that no such language as that used in *The J. E. Rumbell* or *The Guiding Star* would have been used or approved by the Supreme Court had that body for one moment imagined that such use and approval would subsequently be made the basis of a later decision (the *Workman* case), which later decision should thereafter be interpreted in such a manner as utterly to controvert and nullify the original reasoning of the Supreme Court and of Judge Matthews. *The J. E. Rumbell* and *The Guiding Star* simply supply fresh proof of this appellant's contention — namely, that neither the cases on which Mr. Justice White rested the *Workman* decision, nor that decision itself, cover or were intended to cover cases such as the instant one.

The last case cited by Mr. Justice White in support of the particular point under discussion is *The Albert Dumois*, 177 U. S. 240, where it was held that claims for damages arising out of loss of life in a collision were valid under the limited liability act. There was a local statute giving privileges to certain kinds of claims, but the Court, after consideration, decided that such statute did not govern death-claims, and therefore could not apply. *Butler v. Boston & S. Steamship Co.* was followed. In the *Workman* case Mr. Justice White, after citing *The Albert Dumois*, very properly remarked that

“such cases afford no foundation for the proposition that state laws or decisions can deprive

an individual of a right of recovery for a maritime wrong which, under the general principles of the admiralty law, he undoubtedly possessed * * *,”

but neither do such cases afford a foundation for the proposition that the maritime law can be taken advantage of to deprive an individual (or a corporation) of rights and safeguards granted by the laws of its parent state, especially when no risk of miscarriage of justice or question of public policy is involved.

This somewhat lengthy examination of the principles underlying so much of the *Workman* case as affects the case at bar has, it is hoped, not been fruitless. Even aside from the strict limits laid down by Mr. Justice White himself for the application and operation of the decision announced by him, a scrutiny of the authorities therein approved and relied upon conclusively shows that *the Workman case*, far from imposing on courts of admiralty an obligation to override local statutes, simply affirmed not only their power to grant relief where local decisions would refuse it, but also their duty to recognize and enforce local statutes when these latter afford protection not provided by the general maritime law. In other words, the *Workman* case, accurately considered, simply reaffirms the general principle of admiralty jurisdiction which this appellant invokes, through this honorable Court, to validate the conditions under which all parties to this

suit were operating at the time of the collision (and without which, indeed, this appellant could not by law act at all), in order that justice, and not injustice, may be done. *By the terms of the Workman case this Court, sitting in admiralty, has both the power and the duty to do as this appellant requests; and by these same terms this Court has neither the duty nor the power to ignore and sweep away the rights and liabilities imposed by the statute.*

TRUE NATURE OF THIS SUIT.

This suit, in form personal, as for a tort, is brought against The Port of Portland for acts committed by its servants in the course of the pilotage and towing business. The Port of Portland is, of course, quite unauthorized to engage in any such business *apart from the statute*. Apart from the statute, therefore, no suit such as the one under consideration could be brought. Consequently it will be seen that not only the authority of The Port of Portland to tow and pilot vessels, but also its liability to respond in damages for its acts or those of its servants in the exercise of such authority, depends solely upon the statute. The statute being a matter of public origin and record, it is elementary that all persons taking advantage of it are charged with notice of its provisions. Clearly, therefore, this suit, though in form sounding in tort, is based upon a contract—the terms of the statute creating both The Port's duties and its liabilities—without which no tort would be possible. Such

being the case, the provisions of the statute should be looked to and carefully respected in enforcing any liabilities owing their existence solely to such statute. Here the liability, in certain situations, is limited to a certain sum.

It is familiar law that liability may be limited by contract, even when one of the parties is a common carrier. Such limitation is generally accomplished in one of two ways. The most common is that of a stipulation in a contract (generally a bill of lading) against liability for loss or damage arising from particularly enumerated causes. Such cases are:

Burroughs v. N. & W. R. R. Co., 100 Mass. 26,
where a freight tariff exempting the carrier from liability for "collisions," etc., was held to bar suit;

Adams Expr. Co. v. Fendrick, 38 Ind. 150,
—express company held not liable for explosion on steamboat, stipulated against as "damages of river navigation";

Wolff v. The Vaterland, 18 Fed. 733,
—stipulation in bill of lading against rust held valid;

The New Orleans, 26 Fed. 44,
—stipulation in bill of lading against heat held valid;

The Alesia, 35 Fed. 531,

—stipulation in bill of lading against frost held valid;

Constable v. Nat. S. S. Co., 154 U. S. 51,

affirming

Arnold v. Nat. S. S. Co., 29 Fed. 184,

—stipulation in bill of lading against fire after discharge of goods held valid;

The Henry B. Hyde, 90 Fed. 114,

affirming

The Henry B. Hyde, 82 Fed. 681,

and

The Lennox, 90 Fed. 308,

in both of which cases a stipulation against loss by breakage was held valid;

The Prussia, 93 Fed. 837,

—stipulation against latent defects in refrigerating apparatus held valid;

The La Kroma, 138 Fed. 936,

—proviso in bill of lading “not responsible for weight,” held to exempt ship from such liability;

The Niceto, 134 Fed. 655,

—stipulation in bill of lading against damage by nature of goods held valid;

The Claverburn, 147 Fed. 850,

—stipulation in bill of lading against loss by leakage held valid.

See also 36 Cyc. 287-289.

The other common mode of limiting liability by contract is to stipulate that claims for loss or damage will expire unless presented within a certain time. Among the many such cases a few will suffice for illustration:

The Southern Express Co. v. Caldwell, 88 U. S. (21 Wall.) 264,

where a provision that no liability should attach as against the express company unless claim were made within ninety days of the loss, etc., was upheld, both on principle and on authority, by the Supreme Court. Mr. Justice Strong, speaking for the Court, refers to similar limitations of liability on the part of telegraph companies—a line of authority purposely omitted, rather than swell this brief to unnecessary proportions;

Angel v. Cunard S. S. Co., 55 Fed. 1005,

—stipulation that claim be made before removal of goods held binding;

Ginn v. Ogdensburg T. Co., 85 Fed. 985,

—stipulation in bill of lading that claim be made within three months held valid;

The Naranja, 104 Fed. 160,

—stipulation that claim be made inside of twenty-four hours held valid;

The Arctic Bird, 109 Fed. 167,

—stipulation for presentment of claim within ten days held valid;

The Queen of the Pacific, 180 U. S. 49.

reversing

Pac. Coast S. S. Co. v. Bancroft-Whitney Co.,
94 Fed. 180,

—stipulation in bill of lading that claim be presented within thirty days held valid.

See also 36 Cyc. 288-289.

That the English law is the same appears from *Maclachlan, Law of Merchant Shipping* (5th ed.), where it is said (at page 613):

“We have seen that the exceptions in the contract do not protect the shipowner against claims for loss or damages due to the excepted causes, when brought about by the negligence of himself or his servants; but that he may protect himself against the operation of this rule by stipulating expressly and unambiguously, that he will not be responsible for such negligence. Clauses having that object are not common, but they vary greatly in their language.”

The power to limit liability, therefore, by agreement of the parties, is unquestioned in admiralty. It is equally well settled that where a state statute creates rights and liabilities unknown to the general maritime law the admiralty courts will recognize and enforce such rights and liabilities. A few cases will serve as examples:

In re Humboldt L. Mfrs. Assn., 60 Fed. 428;
The Willamette, 70 Fed. 874,

affirming

The Premier, 59 Fed. 797;
The Glendale, 77 Fed. 907;
The Jane Grey, 95 Fed. 693;
Middleton v. La Compagnie, etc., 100 Fed. 866,

—all cases where a local statute giving a personal representative a right of action for death of decedent was held valid and enforceable in admiralty;

The Northern Queen, 117 Fed. 906,

—state statute giving representative a right of action held valid in limited liability proceedings;

In re Clyde S. S. Co., 134 Fed. 99,

—Delaware statute held valid in admiralty;

The Hamilton,
Old Dominion S. S. Co. v. Gilmore, 207 U. S.,
 398,

—Delaware statute held enforceable in limited liability proceedings;

La Bourgogne,

Deslions v. La Compagnie, etc., 210 U. S. 95,

—law of France giving right of action for death held enforceable in limited liability proceedings in the United States;

Monongahela R. C. C. & C. Co. v. Schinnerer,

196 Fed. 375,

—Arkansas statute concerning contributory negligence held valid, not the usual admiralty rule.

Moreover, it has again and again been expressly held that *where a state statute creates rights and liabilities, such rights must be secured and such liabilities enforced strictly according to the terms of such statute, and not otherwise*. One of the earliest cases on this point, and one very frequently cited in the books, is that of *The Red Wing*, 14 Fed. 869, where an action in admiralty to enforce a lien for supplies under the local statute was held barred by the expiration of the time set by the statute within which such action must be begun. The principle was recognized by the Supreme Court as early as 1886, in *The Harrisburg v. Rickards*, 119 U.S. 199, which will be noticed more fully later in this brief. Other cases recognizing the rule (it is no less) are:

The A. W. Thompson, 39 Fed. 115,

—in action for death under state statute, contributory negligence which would be a bar in that state, held a bar in admiralty as well;

Madden v. Lancaster County, 65 Fed. 188,

—limitation in state statute giving right of action for defective bridges, etc., against the county that such action be brought within thirty days of the injury held valid;

Savings & Trust Co. v. Bear Valley Irr. Co.,
89 Fed. 38,

—approving *The Harrisburg v. Rickards*, *supra*, to the extent that a time-limit imposed by statute on a right of action granted by such statute is valid;

The Schooner Robert Lewers v. Kekaouha,
114 Fed. 851,

—upholding Hawaiian decision to the effect that, under the Hawaiian statute providing for the future modification of the common law by the Hawaiian courts, a judgment in such courts giving a widow a right of action in admiralty for her husband's death was valid and binding in admiralty;

Williams v. Quebec S. S. Co., 126 Fed. 591,
and

International Nav. Co. v. Lindstrom, 123 Fed.
475,

—both holding valid time-limits on actions given by statute for death at sea;

The Edna, 185 Fed. 206,

—time-limit, under state statute, for setting up

state lien for supplies upheld as binding in admiralty;

Partee v. St. L. & S. F. R. Co., 204 Fed. 970,
—statutory action for death held barred in Federal Courts by state two-year limitation;

Thompson T. & W. Ass'n. v. McGregor, 207 Fed. 209,
—Michigan statute held operative in admiralty to keep alive widow's claim for death of husband in Canadian waters, though claim barred by law of Canada.

Any liability that might be attached to The Port of Portland in this suit, being founded on the statute creating The Port of Portland, *must necessarily be enforced according to the requirements of that statute and not otherwise*. That this is the settled doctrine of the courts of admiralty in the United States appears not only from the cases noted *supra*, but also even more clearly from the language used by the judges themselves. In *The Edith, Poole v. Tyler*, 94 U. S. (4 Otto) 518, it was said by Mr. Justice Strong, speaking for the Court:

“It is almost superfluous to remark, that whatever lien the appellants ever had, they held it subject to all the provisions of the statute which gave it to them. * * * Clearly the State had power to enact that the lien it created should terminate, if a bond was given in place of the vessel; and the creditor claiming the lien

must take it, subject to the conditions imposed."

In *The Harrisburg v. Rickards*, cited *supra*, the leading case on this point, although the decision of the actual questions presented did not necessarily involve the principle for which we quote it and for which the cases rely upon it, Mr. Chief Justice Waite used the following language:

"The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year; and it would seem to be clear that, if the admiralty adopts the statute, as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. * * * The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

The reasoning of this case was followed out and

applied with characteristic acumen by Judge Brown in

The City of Norwalk, 55 Fed. 98,

where, in holding valid a state statute giving a right of action for death at sea, the learned Judge said (at p. 112) :

“From that decision” (i. e., *The Harrisburg v. Rickards*) “it necessarily follows, that within the sphere in which the municipal law is valid and operative, viz. within the navigable waters of the state, the state law, in the absence of any act of Congress, as to the survival of any such right of action, or any distinctively maritime rule applicable to the case, must furnish the rule of law as to the right of recovery.”

This case was affirmed in *The Transfer No. 4 and The Car Float No. 16*, 61 Fed. 364, as far as concerns Judge Brown’s opinion on this point, although the decree was modified in another particular.

In *Woodward, Wight & Co. v. Dillworth*, 75 Fed. 415, in holding that certain voluntary proceedings, unknown to the state law, resulting in a sheriff’s sale of a vessel, did not divest a lien on her for supplies under the state law, Circuit Judge Pardee, previously to citing authorities, including *The Harrisburg v. Rickard*, said (p. 418) :

“We think there can be no doubt that the lien granted by the local law must be taken

with all the limitations and conditions attached by the lawmakers. This has been specifically held in numerous cases in the United States courts, and from an early day."

Similarly in *Stern v. La Compagnie, etc.*, 110 Fed. 996, Judge Brown said (at p. 1000) :

"But this is * * * a purely statutory action *in personam*, and hence must be governed by the provisions of the statute on which the action rests."

Words more precisely applicable to the instant case could hardly be found; and the rule by which all admiralty courts of the United States should be governed was recently very crisply stated by the Circuit Court of Appeals for the Fifth Circuit in *Quinette v. Bisso*, 136 Fed. 825, where in giving damages for death caused by a river collision under the Louisiana statute, *and in following the analogy of the Louisiana decisions in fixing the amount of such damages*, Judge Jones said (at p. 838) :

"*The statute must be applied in admiralty just as if the suit had been brought in the state courts.*" (Italics ours.)

The principles laid down by the courts as quoted *supra* have been recognized and enforced by the District Court of Oregon, sitting in admiralty, for over thirty-five years. As early as 1887, in the case of *The City of Salem*, 31 Fed. 616, Judge Deady, in holding that a bank's lien, if any, on a vessel

for repairs, attaching (if at all) under the Oregon statute, was barred by the Oregon statute of limitations, said (at p. 619):

“In enforcing liens on vessels given by state statute, courts of admiralty do so subject to every qualification and limitation attached to them by such statutes.”

Again in *Holland v. Brown*, 35 Fed. 43, the same eminent Judge, in giving effect in admiralty to an Oregon statute granting a personal representative a right of action for death and limiting the recovery to \$5000, said (at p. 47):

“Although this suit was brought on the theory that this court might have jurisdiction of the wrong complained of, without the aid of any statute of congress or the state, and therefore the damages were only limited by the judgment of the court, yet on the hearing it was admitted, on the authority of the case of *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. Rep. 140, that the right to damages at all was derived from the statute of the state, which limits the amount to \$5,000, and therefore the claim in the libel for \$10,000 damages was abandoned.”

This ruling was followed in *The S. S. Oregon*, 42 Fed. 78, and in *The Oregon*, 45 Fed. 62, both cases arising out of the same accident, and both decided by Judge Deady. The decree in *The Oregon* was reversed on appeal in *The Oregon*, 158 U. S. 186, and modified accordingly in *The Oregon*,

73 Fed. 846, which in turn was reversed (on a pure question of admiralty practice—i. e., what constitutes commencement of suit) in *Laidlaw v. Oregon R. & N. Co.*, 81 Fed. 876, but in none of the various courts through which the case passed under different forms is there any suggestion of repudiation of Judge Deady's holding concerning the force of the Oregon statute. The opinion on remand in 73 Fed. 846, indeed, puts the Oregon District in line with the others in which the local statute of limitations is considered a bar in admiralty (cases cited *supra*); and although reversed on appeal, there is no intimation by the Appellate Court that the Oregon limitation would not have held good had the statute begun running, which the Appellate Court did not think it had. On the contrary, Judge Ross expressly said (at p. 879 of 81 Fed.) :

“The local law giving the lien, however, conditions the right upon the commencement of the action within two years after the death. Time has thus been made ‘of the essence of the right, and the right is lost if the time is disregarded.’ The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140. Has it been disregarded in the present case? is the question to be decided upon the merits. That depends upon what constitutes the commencement of the libellant's suit. If the filing of his petition of intervention, which, by the order of the court, is permitted to stand as his independent libel, con-

stitutes such commencement, he is, of course, in time, for that was filed within two months after the collision which caused the death of the libelant's intestates. If, however, the time of the seizure of the Oregon under the petition of intervention, treated as an independent libel, is to be taken as the time of the commencement of the suit, then the libelant is clearly barred."

Later still, in *The Aurora*, 163 Fed. 633, Judge Wolverton, in the course of his opinion, said (at p. 635) :

"The adjudications seem to be in accord that, while there is a municipal or local statute authorizing the survivor to sue in the right of the deceased, the action being founded upon negligence causing death, libel *in personam* will lie in admiralty and this whether the title to the chose in action survives, or a new right to sue is given for damages resulting in a tort."

And both the decisions in *The Oregon* and that in *The Aurora* were approved by Judge Wolverton in *The General Foy*, 175 Fed. 590.

It is submitted that it sufficiently appears, to use Judge Wolverton's language in *The Aurora*, *supra* (at p. 636) that:

"*Epecially have the local statutes been given full force in admiralty in this jurisdiction.*" (Italics ours.)

It follows that, if any liability whatsoever attaches

to The Port of Portland in this suit, the limitations set by the statute must be recognized and observed.

RESULTS OF CONTRARY VIEW.

Keeping in mind the distinctions made and the principles established by the foregoing authorities, the confusion caused by the somewhat indiscriminate citation of the *Workman* case may be cleared up. Resting, as it does, merely on the broad principle that, where a tort has been committed on which a suit may be brought under the general maritime law, no local statute may operate to bar such suit, *Workman v. New York* clearly has no bearing upon a case in which, as in the one at bar, no right of action or suit could exist except by operation of the local statute. Any attempt, therefore, to make the reasoning underlying the *Workman* case fit the circumstances of the case at bar can have but one result,—namely, the subversion of the great principles, both of common law and of admiralty, illustrated by the long line of authorities indicated *supra*. In other words, no ruling can be made in the instant case, based upon the decision in *Workman v. New York*, which will not at the same time involve a denial both of the well recognized principle that liability may be limited by agreement between the parties and also of the long established rule under which courts of admiralty must not only recognize local statutes conferring rights foreign to the general maritime law but must also enforce all the terms and pro-

visions of such statutes. (It is, of course, obvious that the fundamental doctrine which prohibits a common carrier from limiting its liability for its own negligence, or that of its servants, has no application here, as it is not and cannot be claimed that The Port of Portland is a common carrier.)

It is submitted that the above considerations sufficiently establish the contention that not only has the *Workman* case no application to the case at bar, but that on both principle and authority this appellant's liability, if any, is limited by the statute, as well in the admiralty jurisdiction as in the courts of this state. Very little speculation, however, is needed to show the disastrous results that might follow an acceptance of any other view. Ever since Judge Story's long and brilliant opinion in the case of *De Lovio v. Boit*, 2 Gallison, 398, the jurisdiction of admiralty over maritime contracts has been unquestioned. What are maritime contracts was thus defined by Judge Story (at pp. 474-475) :

"The next inquiry is, what are properly to be deemed 'maritime contracts'? Happily in this particular there is little room for controversy. All civilians and jurists agree, that in this appellation are included, among other things, charter parties, affreightments, marine hypothecations, contracts for maritime service in the building, repairing, supplying, and navigating ships; contracts between part owners

of ships; contracts and *quasi* contracts respecting averages, contributions and jettisons; and, what is more material to our present purpose, *policies of insurance*. And in point of fact the admiralty courts of other foreign countries have exercised jurisdiction over policies of insurance, as maritime contracts; and a similar claim has been uniformly asserted on the part of the admiralty of England. There is no more reason, why the admiralty should have cognizance of bottomry instruments, as maritime contracts, than of policies of insurance. Both are executed on land, and both intrinsically respect maritime risks, injuries and losses."

Under this definition it is very easy to think of contracts which would both be maritime and at the same time would be governed by the principles as to limitation of liability which govern contracts on land,—for example, a case of limitation of liability by contract between the sender of a wireless telegraphic message concerning general average, and the wireless telegraph company. Plainly, if the doctrine of the *Workman* case is to be applied to such a situation, and the limitation contracted for disregarded on no other ground than that the admiralty law is bound by no limitation not recognized by the general maritime law, the result would be simply confusion and injustice,—the two results which the *Workman* decision was intended to obviate. Similar cases might be

put indefinitely, but the one example will suffice for them all.

It is submitted that from the foregoing but one conclusion is possible: not only is this Court not bound by the *Workman* case, it having no application to the questions here in issue, but, if any liability be held to attach to The Port of Portland, then such liability must be enforced according to and as required by the provisions of the Oregon statute.

Further illustration is supplied by two admiralty doctrines which will be briefly referred to.

In the case of *The John McCracken*, *The Columbia*, 145 Fed. 705, Judge Wolverton held that vessels belonging to The Port of Portland, and used by it in the performance of its public functions of improving and maintaining navigation, are not subject to seizure in a proceeding by libel *in rem* against them. The language used by Judge Wolverton (at p. 708) is as follows:

“The port of Portland was exercising its powers, within the limits of its jurisdiction, according to the legislation of the state; and the vessels in question being the property of the municipality, employed in the public use and necessary to the purposes to which they were being devoted, I am led to the conclusion that the principle of law first herein announced is applicable, and that such vessels are not sub-

ject to seizure at the hands of the government, in a proceeding by libel *in rem* against them."

This case was approved by the same Judge in the District of Oregon in *The George W. Elder*, 159 Fed. 1005.

No elaboration of argument or citation is needed to show that in *The John McCracken* and the many similar cases decided by the admiralty courts throughout the United States local statutes creating certain rights, liabilities, and consequent immunities are recognized and upheld, in strictness of letter and spirit, by the admiralty jurisdiction. The foundation in principle for this doctrine of admiralty is the same as that upon which such local statutes are based,—namely, the soundest kind of public policy.

Statutes limiting the liability of public corporations and of municipal corporations not of this class which are engaged in governmental functions are found upon the statute books of nearly all the states.

In the case of *Pullen v. the City of Eugene*, 146 Pac. 822, a statute of this character (quoted on page 824) was considered by the Supreme Court of Oregon, and the validity of the statute and of the limitation was sustained. This case was again before the Supreme Court of Oregon upon rehearing and rehearing was denied (147 Pac. R. 768). The same case was again before the Supreme Court on a motion to recall the mandate (151 Pac. 474).

In *Humphrey v. the City of Portland*, 154 Pac. 897, a provision of the charter of the city of Portland declaring that the city should not be liable for injuries received from unsafe sidewalks, but imposing the duty to keep sidewalks in repair and liability for injuries from defects on the abutting owner, and providing methods for enforcement of repair of sidewalks by city officials, was under consideration by the Supreme Court. In this case it was held that the charter provision was valid and that the city was not liable. The Court held that the duty of keeping the sidewalk in repair was a governmental duty enjoined upon the city for the benefit of the public in general, and that in failing to discharge that obligation the city engineer omitted the performance of the governmental duty, but that the city was not liable for damages resulting from the injury.

A full discussion of the text writers and decisions upon this subject is contained in this decision.

It will be noted that the validity of acts of this character limiting the liability of municipal and public corporations for damages sustained by reason of negligence or nonfeasance is sustained upon the ground of public policy and upon the further ground that the party injured has his remedy by action against the person through whose negligence or nonfeasance the injury resulted.

The laws of Oregon providing for the licensing of pilots, 2 L. O. L., Section 5156 and following, not

only leave a remedy against the pilot for his negligence, but also require of him a bond payable to the state of Oregon for the use of whom it may concern, thus in effect providing an additional remedy for the person injured through the negligence of the pilot.

Amendment of the Libel of Wilhelm Wilhelmsen

ASSIGNMENTS VII AND VIII

(APOSTLES, PAGES 133 AND 134.)

ASSIGNMENTS VIII, IX AND X

(APOSTLES, PAGES 259 AND 260.)

In Article X of Wilhelmsen's libel there are alleged various acts of negligence on the part of the "Thielbek" and "Ocklahama" and of their officers. These allegations are divided into twelve paragraphs; but *nowhere in the libel is any negligence attributed to the "Thode Fagelund" or her pilot.* On the contrary, in Article XI it is somewhat lengthily alleged that *nothing could have been done by the "Thode Fagelund" "between the instant when the imminent danger of collision was first perceived * * * and between that instant and when the actual impact occurred"* to avoid the collision.

In this connection it is instructive to note also that the allegations of Wilhelm Wilhelmsen in the suit numbered 6116, in which Wilhelm Wilhelmsen is respondent, in his answer to the libel of Knohr & Burchard, Nfl., are even more emphatic in denying negligence on the part of the "Thode Fagelund."

At the end of Article VI of such answer, after a minutely detailed series of averments and denials concerning the navigation of the vessels and their collision, occurs the following language:

“* * * and so, without further answering, respondent says that the circumstances and occurrences propounded in said Article VI” (i. e. Article VI of the libel of Knohr & Burchard, Nfl., which this Article VI of Wilhelm Wilhelmsen’s answer is designed to meet) “did not occur or come about by anything that was done by the ‘Thode Fagelund.’ ”

Article IX of said answer *denies* “each and every matter and thing propounded” in Article IX of Knohr & Burchard’s libel, the contents of which will be found to contain nothing but allegations of negligence on the part of the “Thode Fagelund.”

Article XII

“Denies that the collision was caused by the fault of the ‘Thode Fagelund’ as in said libel in anywise propounded.”

At the end of Article XVIII it is alleged that

“The said pilot of the ‘Ocklahoma’ and those on the ‘Thielbek’ * * * should not now be heard or allowed to say, nor should The Port of Portland be now heard or allowed to say, that the ‘Thode Fagelund’ did or committed anything or omitted or failed to do anything at the time of the collision or immediately prior

thereto which caused or contributed to the same, for that anything the 'Thode Fagelund' did or could have done would not have prevented said collision, and if the 'Thode Fagelund' had omitted to do the things she did do it would not have prevented the collision, but the same and the cause thereof is solely and only due to the failures and omissions of the 'Ocklahoma' and the 'Thielbek' as in this answer and in the libel at first instance propounded, reference being had to Rule XI and Article 27 of the Pilot and Sailing Rules approved by the Acts of Congress."

If, according to this libelant's view, neither the "Thielbek" nor The Port of Portland should be allowed to accuse the "Thode Fagelund" of negligence, it is difficult to see how the "Thode Fagelund's" owner should be allowed to do so.

THE AUTHORITIES.

In the belief that the attempt on the part of Wilhelm Wilhelmsen to escape the consequences of an adverse decision by turning the rules of admiralty practice, and indeed of all legal procedure, inside out is too plainly opposed to the spirit of the law to require contradiction, it is not considered necessary to make any lengthy citation of authority. It is undoubted that the matter lies largely in the discretion of the court; but the following cases are conclusive to the effect that the court's discretion, in

cases of this kind, can lie in only one direction,—namely, the refusal of the proffered “amendments”:

1 Cyc., 859, 860;

Benedict, *Admiralty*, Sec. 413, p. 281 (4th ed.);

McCarthy v. Eggers and Janssen, 10 Benedict, 688,

particularly the remarks of Judge Benedict on page 692, line 11 and following;

The Corozal, 19 Fed. 655,

where Judge Billings, speaking of the twenty-fourth Admiralty Rule, said (at p. 656):

“The meaning was not to abrogate or qualify the universal rule of pleading * * * that ‘amendments are, however, always limited by due consideration of the rights of the opposite party; and where, by the amendment he would be prejudiced, it is not allowed.’ In the system of pleading in admiralty, the rules of the common-law courts, so far as they are technical, are relaxed, but so far as they are founded upon justice between the parties, are unabated * * *”;

New Haven Steam-Boat Co. v. The Mayor, etc., 36 Fed. 716,

particularly the language of Judge Brown beginning four lines from the bottom of page 718;

The Horace B. Parker, 74 Fed. 640,

--a brief but decisive condemnation by the court of just such an application as libelant makes here;

The Habil, 100 Fed. 120,

in which see Judge Toulmin's opinion, beginning at the first paragraph on page 123;

Brennan v. Peter Hagan & Co., 147 Fed. 290,

where an application to amend by alleging negligence not previously alleged was refused when the case came on for argument, on the ground that the facts relied on in the amendment were known to the applicants when they filed their original pleadings; *a fortiori* the court would have refused such an amendment, and should have done so, *if, as in the case at bar, such amendment had not been offered until after decision and judgment on the whole case;*

The Ask, 156 Fed. 678,

in which see particularly Judge Hough's opinion on the motion to amend the libel, on page 681 and beginning at line 26 of page 682;

The Wildenfels, 161 Fed. 864,

especially that part of Judge Coxe's opinion beginning at line 23 on page 865; and

The Bencliff, 161 Fed. 909,

--the last paragraph of Judge Buffington's opinion, on page 911.

In the case of *The Thomas Melville*, 31 Fed. 486, Judge Brown has summed up the law on situations of this character as follows (p. 488):

“In admiralty causes, where testimony is taken upon all the merits of the case without objection, and no surprise or injury can result to either party, the pleadings will be deemed conformed to the proofs. See *The Maryland*, 19 Fed. Rep. 551, 557, and cases there cited. And so also, where the libel contains only a general charge of negligence, and the parties go to trial without any other specification of the kind of negligence, assent to proof of any kind of negligence may be inferred. But as the respondent would be entitled, on demand, to have the particulars of negligence specified, so, *where the libel in connection with an averment of negligence in general, sets forth the particular kind of negligence for which the claim is made, the issue must be deemed limited to those particulars as much so as if a bill of particulars had been served on demand. To permit an amendment by averring substantially a new cause of damage at the trial, where reasonable objection appears, cannot be allowed. As a rule, it would be unjust and impolitic.*”

See also the words of the same admiralty authority in *Burrill v. Crossman*, 65 Fed. 104, on the motion to amend the libel (last paragraph of the opinion on page 111).

The principle to be deduced from these cases is that amendments of the libel in the interest of justice may be and should be permitted in the discretion of the court, provided that a party shall not be allowed so to amend his libel as entirely to abandon the allegations of the original libel and to substitute for the same an entirely new cause of action. The amount of the damages may be amended in such manner that the libelant may claim a larger sum for the same injury alleged in the libel. He may indeed introduce by amendment an additional item of damage or factor of damage and he may recover one-half his damages where he fails to show that the entire fault was with the libeled ship or the opposite party. In all these cases, however, he does not abandon his original cause of action, but recovers upon the allegations of such original libel.

In *Brennan v. Peter Hagan & Co., supra*, the court refused to allow an amendment to the answer upon the ground that the respondents must have had knowledge of the facts relied on in the proposed amendment and should have made their complete defense at an earlier stage of the cause.

In *McCarthy v. Eggers and Janssen, supra*, the District Court refused to allow the defendant to amend his answer and set up that he was a mortgagee out of possession, because he pleaded ownership and set up an agreement consistent only with ownership and failed to prove this upon the trial.

In *The Horace B. Parker, supra*, the court denied the application to amend, saying "the allegations sought to be amended were formed with such deliberation as they now stand, that at the hearing of the cause in this Court they were insisted on by the petitioners both orally and in their brief. There is no equity in the application."

In *The Habil, supra*, at page 123, the District Court says, "*in no case should an amendment be allowed on the hearing which would change the entire cause of action.*"

Again in *The Ask, supra*, a motion to amend the libel was made after the testimony was closed and the case submitted and argued, but seemingly before the decision was rendered. The court (Hough, District Judge), says "amendments in matters of substance should not be allowed on the hearing unless the justice of the case requires it and then to conform to the brief; *and in no case should an amendment be allowed on the hearing which would change the entire cause of action.*"

Applying the principle of these cases to the case at bar, it was clearly error by the trial court to allow the amendment. On the trial the libellant, Wilhelm Wilhelmsen, based his entire cause of action upon negligence in the navigation of the "Thielbek" and "Ocklahama," and negatived most positively any negligence in the navigation of the "Thode Fagelund" or on the part of its pilot. He sought to recover damages which he should have

sustained by reason of the alleged negligence in the navigation of the "Thielbek" and the tow-boat "Ocklahama," and predicated his right to recover against The Port of Portland upon the specification of negligence and of the kind of negligence. In other words, his entire case was predicated upon the particular negligence alleged in the libel. To allow him, therefore, to amend his libel by alleging that the damages were due to the negligence of the pilot in charge of the "Thode Fagelund" is to allow him to change his cause of action entirely. Such amendments are not in consonance with justice or equity. If they are to be permitted, pleadings in admiralty are entirely unnecessary, and the admiralty rules which entitle either party to require an answer or oath to interrogatories propounded touching all and singular the allegations in the libel, or any matters charged in the libel, or touching any matter of defense set up in the answer, are wholly without effect.

Summary

The Port of Portland respectfully submits that there is error in the record as assigned, and that The Port should not be held liable for the damages resulting from the collision between the "Thode Fagelund" and the "Thielbek" in any sum whatever; but, if it should be held liable at all, that it should be held liable to the owners of the "Thielbek" only for the full amount of the damage to that vessel, and to the owner of the "Thode Fagelund" only for

ten thousand dollars, the amount of the limitation contained in the statute under which Pilot Nolan was acting as agent for The Port of Portland. The Port submits moreover, that, if it should be found liable to the "Thielbek," it is entirely on account of the negligence of the pilot upon the "Thode Fagelund," such damage under the findings of fact resulting entirely from the negligence of the pilot on the "Thode Fagelund," and the limitation would apply to this damage as well as to the damages sustained by the "Thode Fagelund" itself. If, therefore, the "Thode Fagelund" should pay the amount of damages sustained by the "Thielbek," the amount so paid would be damage resulting from the negligence of the pilot on the "Thode Fagelund," and it would be entitled to recover of this amount only the sum of ten thousand dollars.

TEAL, MINOR & WINFREE and
ROGERS MAC VEAGH,

*Proctors for Appellant,
The Port of Portland.*